Supreme Court, U.S.
FILED
JUL 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-50

No. 87-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

JANE ROE I, JANE ROE II, J. HARVEY JOHNSON, III, WILLIAM W. WEST, DALLAS MEDICAL LADIES CLINCE, CHOICE, BILLIE MUMFORD, IVA MARIE STEWART, MARIA FERNANDEZ, CAROLYN ROZEBOOM, ELIZABETH BLANTON, and DELORIS HENDRIX,
Petitioners,

v.

ABORTION ABOLITION SOCIETY, WINSTON WILDER, BOB CARROLL, SUSAN HINSON, DAVID M. LYLES, ROB FARRELL, ROY FARRELL, GARY DAVIS, JOHN DOE, CITY OF MESQUITE, and CITY OF DALLAS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

NEIL H. COGAN
Attorney for Petitioners
Counsel of Record
34 Efrata
Jerusalem, Israel
011-972-2-718729

CARLA DOWBEN, P.C.
Agent for Sending and Receiving Service only,
300 Cresent Court, 7th Floor
Dallas, Texas 75201-1841
(214) 855-3771

QUESTIONS PRESENTED FOR REVIEW

1. Are the victims of a religious conspiracy protected by 42 U.S.C. 1985(3)?

2. Are the victims of a religious conspiracy protected by 42 U.S.C. 1985(3) if the victims are not members of "a particular religious denomination?

TABLE OF CONTENTS

	Page
Jurisdiction	1
Provision Involved	2
Statement of the Case	2
Argument	4
Conclusion	12
Appendix A	1a
Appendix B	2a
Appendix C	14a
Appendix D	22a

TABLE OF AUTHORITIES

Cases:	Page
Agarwal v. Regents of the University of Minnesota, 788 F.2d 504 (8th Cir. 1986)	7
Colombrito v. Kelly, 764 F.2d 122 (2d Cir. 1985)	6
Cutting v. Muzzey, 724 F.2d 259 (1st Cir. 1984)	8
D'Amato v. Wisconsin Gas Co., 760 F.2d 1474 (7th Cir. 1985)	7
Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986)	6
Great American Fed. S&L Ass'n v. Novotny, 442 U.S. 366 (1979)	8
Griffin v. Breckenridge, 403 U.S. 88 (1971)	5, 8
Grimes v. Smith, 776 F.2d 1359 (7th Cir. 1985)	6
Harrison v. KVAT Food Management, Inc., 766 F.2d 155 (4th Cir. 1985)	6
Larson v. Valente, 456 U.S. 228 (1982)	5
Marlowe v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973)	7
McLean v. Int'l Harvester Co., No. 86-2454 (5th Cir., June 2, 1987)	6
New Orleans V. Dukes, 427 U.S. 297 (1976)	5
Novotny v. Great American Fed. S&L Ass'n, 584 F.2d 1235 (3rd Cir. 1978), rev'd, 442 U.S. 366 (1979)	8
Rayborn v. Mississippi State Board of Medical Examiners, 776 F.2d 530 (5th Cir. 1985)	6
Saint Francis College v. Al-Khazraji, No. 85-2156 (May 18, 1987)	9
Shaare Tefila Congregation v. Cobb, No. 85-2156 (U.S., May 18, 1987)	9
Taylor v. Gilmartin, 686 F.2d 1346 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983)	7

TABLE OF AUTHORITIES

Page

Cases (Continued):

United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825 (1983) ..... passim

United States v. Carolene Products Co., 304 U.S. 144 (1938) 5

United States v. Harris, 106 U.S. 629 (1883) 10

United States v. Seeger, 380 U.S. 163 (1965) 7

United States v. Sisson, 297 F.Supp. 902 (D. Mass. 1969), appeal dismissed, 399 U.S. 267 (1970) 7

Waller v. Butkovich, 584 F.Supp. 909 (D.D.C. 1984) ... 8

Welch v. United States, 398 U.S. 333 (1970) 7

Statutes:

28 U.S.C. 1254(1) 1

28 U.S.C. 1331 2

42 U.S.C. 1985(3) ..... passim

Civil Rights Act of 1866, 14 Stat. 27 10

Civil Rights Act of 1875, 18 Stat. 335 10

Voting Rights (Enforcement) Act of 1870, 16 Stat. 140 10

Legislative History:

Cong. Globe, 42d Cong., 1st Sess., App. 68, col. 2 (Mar. 28, 1871) (Rep. Shellabarger) 10

Cong. Globe, 42d Cong., 1st Sess., App. 311, Cols. 2-3 (Mar. 30, 1871) (Rep. Maynard) 4

Cong. Globe, 42d Cong., 1st Sess., App. 153, col. 3 (Apr. 4, 1871) (Rep. Garfield) 5

Cong. Globe, 42d Cong., 1st Sess., 567, cols. 2-3 (Apr. 11, 1871) (Sen. Edmunds) 4

TABLE OF AUTHORITIES

Other Authorities: **Page**

C. ANTIEAU, FREEDOM FROM FEDERAL ESTABLISHMENT (Milwaukee: Bruce Publishing Co., 1964) 8

HISTORY OF BIGOTRY IN THE UNITED STATES, H. CHRISTIAN ED. (New York: Capricorn Books, 1960) 5

T. CURRAN, XENOPHOBIA AND IMMIGRATION, 1820-1930 (Boston: Twayne Pub., 1975) 5

Menendez, *"The Flames of Fanaticism,"* Church & State, p. 7 (Feb. 1985) 11

"Neo-Nazi Describes Assassination Plans," *New York Times,* Sept. 14, 1985, p. 7, col. 1 11

A. Udovitch, *"Non-Muslims in Islamic Law: The Muslim View of Religious Differences,"* International Congress, A Member of Another Religion in Religious Law, Hebrew University, Jerusalem (Apr. 27-30, 1987) 9

E. Urbach, *"The Attitude towards Strangers in Judaic Tradition,"* id. 9

No. 87-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

JANE ROE I, JANE ROE II, J. HARVEY JOHNSON, III, WILLIAM W. WEST, DALLAS MEDICAL LADIES CLINCE, CHOICE, BILLIE MUMFORD, IVA MARIE STEWART, MARIA FERNANDEZ, CAROLYN ROZEBOOM, ELIZABETH BLANTON, and DELORIS HENDRIX,
Petitioners,

v.

ABORTION ABOLITION SOCIETY, WINSTON WILDER, BOB CARROLL, SUSAN HINSON, DAVID M. LYLES, ROB FARRELL, ROY FARRELL, GARY DAVIS, JOHN DOE, CITY OF MESQUITE, and CITY OF DALLAS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners Jane Roe I, et al., respectfully petition this Court for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

The opinion of the Court of Appeals is reported at 811 F.2d 931. See pp. 2a-13a. The opinion of the district court is unreported. See pp. 14a-21a.

JURISDICTION

Jurisdiction is founded upon 28 U.S.C. 1254(1). The order of the Court of Appeals was entered March 9, 1987. See p. 1a. On May 22, 1987, Justice White granted petitioners' application for an extension of time to file this Petition to and including July 8, 1987.

PROVISION INVOLVED

42 U.S.C. 1985(3) provides in part:

> If two or more persons . . . conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . , the party so injured or deprived may have an action for the recovery of damages . . . .

STATEMENT OF THE CASE

Petitioners are a women's clinic, its staff and its patients (hereinafter, "the clinic staff and patients"). See Second Amended Complaint paras. 6-10, pp. 24a-26a. The clinic provides women with medical services, including pregnancy termination. See id., para. 8, pp. 25a-26a. Respondents are a religious society and several of its members (hereinafter, "the religious society members"). See id., para. 11, pp. 26a-27a.[1]

The clinic staff and patients asserted below that the religious society members entered into a religiously-inspired conspiracy. See id., paras. 11, 16-17, 20-22, pp. 26a-27a, 28a-32a, 34a-35a. That religious conspiracy, it was asserted, seeks to prevent the patients from travelling to and gaining the services of the clinic, and the staff from travelling to and providing services at the clinic. See id.

In a complaint filed March 21 and amended April 24, 1985, the clinic staff and patients sued the religious society members in the United States District Court for the Northern District of Texas. The complaint asserted a federal claim under 42 U.S.C. 1985(3) (hereinafter, "Section 1985(3)") and state pendent claims; it founded jurisdiction under 28 U.S.C. 1331. See id., para. 2, p. 23a.

---

[1]Respondents are also the Cities of Mesquite and Dallas, but no questions arising out of petitioners' claims regarding these respondents are raised in this Petition.

The complaint asserted that the religious society was "dedicated on religious grounds to the eradication of clinics for pregnancy termination." Id., para. 12, p. 27a. It asserted that the religious society members had conspired against the clinic staff and patients, whom they perceived to "hold different religious views." Id., para. 21, p.35a.

The complaint asserted that the religious society members did not impede the rights of those persons with religious views similar to their own. See id., paras. 20-21, pp. 34a-35a. It asserted that, as a result of the religious conspiracy, the religious society members had impeded the rights of the clinic staff and patients, including their federal right of travel and their state right of non-interference in business relationships. See id., paras. 20-23, 34-35, pp. 34a-36a, 39a. Among other things, the complaint asserted, the religious society members had blocked cars, driveways, doorways and pedestrians and threatened staff and patients. See id., para. 16, pp. 28a-31a.[2]

On April 17, 1986, the district court dismissed the complaint against the religious society members, holding that Section 1985(3) does not prohibit a conspiracy motivated by religious animus. See p. 21a. On March 9, 1987, the Court of Appeals for the Fifth Circuit affirmed, holding that regardless of whether Section 1985(3) prohibits such a conspiracy, the statute does not prohibit a conspiracy against persons who are not "members of a particular religious denomination" but who simply are perceived by the conspirators to share "a specific belief." See p. 9a.

---

[2]The complaint asserted that the Cities of Mesquite and Dallas "failed to provide, or have refused to allow" adequate police protection against the activities of the religious society members. Second Amended Complaint, para. 18, p. 32a. It asserted that the clinic's Mesquite office was destroyed "by a deliberate act of arson . . .." Id., para. 8, p. 25a.

ARGUMENT

This case presents two related questions of religious discrimination — whether the victims of a religious conspiracy are protected by Section 1985(3) (hereinafter, "the religious animus issue"); and whether the victims of such a conspiracy are protected if they are not members of "a particular religious denomination" (hereinafter, the denomination issue"). While only the district court answered the religious animus issue (in the negative) and only the court of appeals answered the denomination issue (in the negative), both questions are appropriate and ripe for decision by this Court.

1. In *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 837 (1983), this Court reserved the issue of what kinds of animus other than racial animus are within the scope of Section 1985(3). This case presents a good opportunity to decide the issue both because of the nature of the animus presented and because of the nature of the record. Moreover, since the decision in *Scott*, the Circuits have been in conflict as to whether Section 1985(3) is limited to racial animus.

If any animus other than racial animus is within the historical scope of Section 1985(3), it is religious animus. Not only was religious animus mentioned by Senator Edmunds in his much-quoted statement, see Cong. Globe, 42d Cong., 1st Sess. at 567, cols. 2-3 (Apr. 11, 1871) ("because he was a Catholic, or because he was a Methodist"), but religious animus was mentioned elsewhere in the legislative record, see id., App. 311, cols. 2-3 (Mar. 30) (Rep. Maynard) ("the man whose religion . . . is at variance with the common belief"). Religious animus is the kind of animus that may cause local law enforcement officials to "neglect or refus[e] to enforce" local laws, which was the cause and theory upon which Rep.

Garfield joined the Republican majority. Id., App. 153, col. 3 (Apr. 4). And violence motivated by religious animus was well known to the legislators of the 1860's and 1870's. See HISTORY OF BIGOTRY IN THE UNITED STATES, H. CHRISTIAN ED. (New York: Capricorn Books, 1960), and T. CURRAN, XENOPHOBIA AND IMMIGRATION, 1820-1930 (Boston: Twayne Pub., 1975).

Moreover, given this Court's historical understanding of discrimination, it is both sensible and limited to read "religious animus" as the kind of "class-based, invidiously discriminatory animus" within the scope of Section 1985(3). See *Griffin v. Breckenridge,* 403 U.S. 88, 102 (1971). In its well-known footnote 4 in *United States v. Carolene Products Co.,* 304 U.S. 144, 152 (1938), this Court identified three kinds of discrimination as calling for "more searching judicial inquiry;" these were religious, national origin and racial discrimination (in that order). This Court has applied strict scrutiny to religious discrimination, see, e.g., *Larson v. Valente,* 456 U.S. 228 (1982), and has described such discrimination as "invidious." See, e.g., *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976). And in *Scott,* four members of this Court identified religious animus as per se the kind of animus within the scope of Section 1985(3). 463 U.S., supra at 853.

This record frames the religious animus issue well because the issue was decided on a motion to dismiss, in which it was assumed as true that the defendants are a religious society and its members; that the members did enter into a religious conspiracy; that they conspired against the clinic staff and patients, whom they perceived as holding different religious views; that they did not impede the rights of persons holding similar religious views but did impede the rights of the clinic staff and patients; and that they impeded rights protected against private action, including the federal right

of travel and the state right of non-interference in business relationships.

While the district court, and not the court of appeals, decided the religious animus issue, the court of appeals has said in other cases that after *Scott* only racial animus is within the scope of Section 1985(3). See *Rayborn v. Mississippi State Board of Medical Examiners,* 776 F.2d 530, 532 (5th Cir. 1985) ("[t]he conspiracy must be race-based to state a cause of action for violation of [Section] 1985(3)"); *McLean v. Int'l Harvester Co.,* No. 86-2454 (5th Cir., June 2, 1987) ("this Court has expressly cautioned against extension of Section 1985(3) beyond the racial prejudice it was enacted to address").

Three other courts of appeals have since *Scott* also limited the scope of Section 1985(3) to racial animus. See *Harrison v. KVAT Food Management, Inc.,* 766 F.2d 155, 162 (4th Cir. 1985) ("[t]he significance of the Court's determination in *Scott* that the evidence of Congressional intent did not warrant a widening of the scope of protection under [Section] 1985(3) should not be ignored"); *Grimes v. Smith,* 776 F.2d 1359, 1366 (7th Cir. 1985) ("[t]he import of both *Griffin* and *Scott* is that the legislative history of [Section] 1985(3) does not support extending the statute to include conspiracies other than those motivated by a racial class-based animus against 'Negroes and their supporters' "); *Gibson v. United States,* 781 F.2d 1334, 1341 (9th Cir. 1986) ("[t]he Supreme Court recently reaffirmed the special intent requirement established in *Griffin* and, indeed, explicitly restricted the statutory coverage to conspiracies motivated by racial bias").

In conflict with these courts, at least two courts of appeals have held since *Scott* that religious animus is within the scope of Section 1985(3). See *Colombrito v. Kelly,* 764 F.2d

122, 130-31 (2d Cir. 1985); *Agarwal v. Regents of the University of Minnesota,* 788 F.2d 504, 509-10 (8th Cir. 1986).[3] And the similar pre-Scott holdings of two other courts of appeals are still good law. See *Marlowe v. Fisher Body,* 489 F.2d 1057, 1065 (6th Cir. 1973); *Taylor v. Gilmartin,* 686 F.2d 1346, 1357-58 (10th Cir. 1982), *cert. denied,* 459 U.S. 1147 (1983).

2. The court of appeals' decision of the denomination issue conflicts with both statutory and constitutional decisions of this Court in protecting the religious beliefs of persons not members of "a particular religious denomination." The decision of the denomination issue, when understood as an issue of standing, conflicts with the decisions of other courts of appeals on who has standing under Section 1985(3). And the decision of the denomination issue conflicts with the nature of discrimination as understood by the 1871 Congress and understood since.

In contrast to the court of appeals, this Court has read statutes broadly to avoid the constitutional conflict that would arise from limiting statutory protection to particular religious denominations only. See *United States v. Seeger,* 380 U.S. 163, 176 (1965); id. at 192 (Douglas J.); *Welch v. United States,* 398 U.S. 333, 339-44 (1970) (Black, J.). Where statutes could not legitimately be read to avoid conflict, members of the Court have decided the constitutional issue. See id. at 356-61 (Harlan, J.) (in granting draft exemptions, Congress cannot discriminate against persons holding nontheistic religious beliefs or persons guided by inner ethical teachings); id. at 367-74 (WHITE, J.) (*contra*); *United States v. Sisson,* 297 F.Supp. 902, 910-12 (D. Mass.

[3]After this Court's decision in Scott but before the Seventh Circuit's decision in *Grimes,* 776 F.2d 1359 (1985), noted in the text, the Seventh Circuit had held that religious animus was within the scope of Section 1985(3). See *D'Amato v. Wisconsin Gas Co.,* 760 F.2d 1474, 1486 (7th Cir. 1985).

1969) (Wyzanski, C.J.), appeal dismissed, 399 U.S. 267 (1970). The Court's mode of reading statutes finds strong support in the history of the Establishment Clause, which sought to give protection from religious denominations as much as to religious denominations. See C. ANTIEAU, FREEDOM FROM FEDERAL ESTABLISHMENT (Milwaukee: Bruce Publishing Co., 1964).

When the denomination issue is understood as a standing issue, the court of appeals' decision is in conflict with this Court's apparent decision in *Great American Fed. S&L Ass'n v. Novotny,* 442 U.S. 366 (1979), and the decisions of two courts of appeals. In *Novotny,* the standing issue was whether a man was protected by Section 1985(3) where the conspiracy was directed against women but injured the man in its course. The Third Circuit held that the man had "standing," that is, he was protected even though not within the group at which the conspiracy was directed, 584 F.2d 1235, 1244-45 (1978). While this Court did not decide the issue directly, Justice WHITE said that the Court appeared to agree with the Third Circuit. See 442 U.S. at 387 and n.4. Accord: *Cutting v. Muzzey,* 724 F.2d 259, 260 (1st Cir. 1984); *Waller v. Butkovich,* 584 F.Supp. 909, 936-38 (D.D.C. 1984).

What the decision in *Novotny* means is that Section 1985(3) prohibits conspiracies motivated by certain kinds of animus and offers a remedy to all persons injured as a result; there is no need to be within a pristine class in order to recover. This is in keeping with the statutory language, which protects "any person or class of persons," and this Court's decision in *Griffin v. Breckenridge,* where the Court held that the plaintiffs might recover even if the conspiracy were aimed only at one person, " 'a worker for Civil Rights for Negroes.' " 403 U.S., *supra* at 103. The court of appeals' decision — that only persons within "a particular religious

denomination" may recover — is in conflict with this understanding of who has standing under Section 1985(3).

Moreover, the court of appeals' decision is in conflict with the nature of discrimination, as understood by the 1871 Congress and understood since. See *Shaare Tefila Congregation v. Cobb,* No. 85-2156 (U.S. May 18, 1987). Both the majority and the dissent in Scott recognized that the First Klu Klux Klan did not discriminate against pristine classes; the majority spoke of "animus . . . against Negroes and their sympathizers," 463 U.S., *supra* at 838, and the dissent spoke of "any class of persons, whose beliefs or associations placed them in danger of not receiving equal protection of the law from local law enforcement officials." Id. at 853. Similarly, rather than targeting pristine groups, religious discrimination often targets the non-believer, the "stranger" or "alien;" an academic discipline is dedicated to the study of such discrimination. See A. Udovitch, *"Non-Muslims in Islamic Law: The Muslim View of Religious Differences,"* International Congress, A Member of Another Religion in Religious Law, Hebrew University, Jerusalem (Apr. 27-30, 1987); E. Urbach, *"The Attitude towards Strangers in Judaic Tradition,"* id.

3. The court of appeals' decision — with respect to both the religious animus and denomination issues — conflicts with the proper reading of Reconstruction statutes. This Court, in *Saint Francis College v. Al-Khazraji,* No. 85-2156 (May 18, 1987), reiterated the importance of reading those statutes as they would have been read during the Reconstruction period.

First, in reading those nineteenth-century statutes, the reader must emphasize the words. The words as originally enacted — "any person or any class of persons" — and as now codified — "any person or class of persons" — do not restrict protection to racial classes only or to religious

denominations only.[4] While they do not support its constitutional decision-making, petitioners do note that this Court in *United States v. Harris,* 106 U.S. 629, 640-41 (1883), did read the words of Section 1985(3)'s identical criminal counterpart as including non-racial conspiracies. The Court said that the words included conspiracies by "two or more colored persons . . . against another colored citizen" and "two free white men against another free white man . . . ." See id.

Second, to understand the Reconstruction statutes, the reader must read them together; they were part of a continuing effort rather than distinct inspirations. When the anti-discrimination statutes from the Civil Rights Act of 1866, 14 Stat. 27, through the Civil Rights Act of 1875, 18 Stat. 335, are read together, the reader understands that the Congress carefully distinguished its use of "race," "color," and "involuntary servitude," from its use of "person" and "class." This is especially clear when the reader compares Section 1985(3) with the statutes that were its models, Section 2 of the Civil Rights Act of 1866, 14 Stat. 27, and Section 6 of the Voting Rights (Enforcement) Act of 1870, 16 Stat. 140, 141.

Third, in reading the legislative history of Section 1985(3), the reader cannot simply read that small portion of the debate which occurred in the House after the introduction of the Shellabarger amendment. See *United Brotherhood of Carpenters & Joiners v. Scott,* 463 U.S., supra at 836-37. A reader who reads the entire Congressional text on "Enforcement of the Fourteenth Amendment," "Southern Disorders/Outrages" and similar topics — if only for March and April, 1871, if not earlier — understands that the

---

[4]Rep. Shellabarger, in introducing Section 1985(3), said that the statute should be "liberally and beneficially construed." Cong. Globe, 42d Cong., 1st Sess., App. 68, col. 2 (Mar. 28, 1871).

committee reports, the proposed bills and the debate in both the House and Senate concerned denials of equality, all of which are valid and traditional legislative history. This more complete text shows too that the words of Section 1985(3) are not limited to racial classes or religious denominations.

Most respectfully, petitioners wish to bring before the Court a full discussion of the statutory and legislative texts, including recent historical and legal scholarship. These materials have not before been presented, or have not been presented adequately, to the Court.

4. Finally, the court of appeals' decision — coupled with those of other courts of appeals reading Section 1985(3) as limited to racial animus — has denied to individuals and businesses alike a vital federal protection to the federal right of interstate travel and the State right of non-interference in business relations, among other rights. This is especially troublesome given an important premise of Section 1985(3) — where there are conspiracies motivated by invidious discrimination federal protection is needed because local law enforcement officials may be unable or unwilling to enforce local laws. See pp. 4-5 supra.

Religious conspiracies are not uncommon in the nation, and the exercise of federal power is often needed to suppress them. See, e.g., *"Neo-Nazi Describes Assassination Plans,"* New York Times, Sept. 14, 1985, p. 7, col. 1 ("The Order;" "Silent Brotherhood;" "Aryan Nations"); Menendez, *"The Flames of Fanaticism,"* Church & State, p. 7 (Feb. 1985) (arsonist asserted he was a member of the "Army of God"). The clinic staff and patients sought federal protection precisely because they believed that local law enforcement authorities were unable or unwilling to protect their travel and business relationships.

See Second Amended Complaint, paras. 17-18, pp. 31a-34a. The clinic staff and patients believed that the federal courts had the competence and independence to protect those rights against a religious conspiracy.

CONCLUSION

Petitioners respectfully request that this Court issue a writ of certiorari to the Court of Appeals for the Fifth Circuit and reverse the order of that Court in this case.

Respectfully submitted,

NEIL H. COGAN
Attorney for Petitioners
Counsel of Record
34 Efrata
Jerusalem, Israel
011-972-2-718729

CARLA DOWBEN, P.C.
Agent for Sending and
Receiving Service Only
300 Crescent Court, 7th Floor
Dallas, Texas 75201-1841
(214) 855-3771

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1264

D. C. Docket No. CA-3-85-0577-R

JANE ROE I, JANE ROE II,
on behalf of themselves and all others
similarly situated, *et al.*,
Plaintiffs-Appellants,
versus
ABORTION ABOLITION SOCIETY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

Before RUBIN, JOHNSON, and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that appellants pay to appellee, the Abortion Abolition Society, its costs on appeal; appellee, the City of Mesquite, pay to appellants one-fourth of their costs on appeal; appellee, the City of Dallas, pay to appellants one-fourth of their costs on appeal, and one-half of their costs on appeal is to be borne by appellants, said costs to be taxed by the Clerk of this Court.

U.S. COURT OF APPEALS
FILED
MAR 9 1987
Gilbert F. Ganucheau
Clerk

APPENDIX B

No. 86-1264.

United States Court of Appeals,
Fifth Circuit.

March 9, 1987.

JANE ROE I, JANE ROE II,
on behalf of themselves and all others
similarly situated, *et al.*,
Plaintiffs-Appellants,

versus

ABORTION ABOLITION SOCIETY, *et al.*,
Defendants-Appellees.

Affirmed in part, reversed in part, and remanded.

Appeal from the United States District Court for the Northern District of Texas.

Before RUBIN, JOHNSON, and JONES, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Three issues are presented: whether the Ku Klux Klan Act of 1871, 42 U.S.C. § 1985(3) (1982), authorizes a suit against a class described in the complaint as victims of a conspiracy against persons who do not share the anti-abortion religious beliefs of the conspirators; whether the district court properly dismissed without prejudice a suit against a municipality brought under another provision of that Act, 42 U.S.C. § 1983 (1982), for failure of the city police force, pursuant to municipal practice, to protect those who favor the right to abortion from molestation by those who do not; and whether the settlement of such a claim against another city requires court approval.

I.

Two anonymous patients; two doctors who provide abortions for women desiring them; the Dallas Medical Ladies Clinic, which operates a clinic providing abortion

services; members of the clinic staff; and an organization that provides escort services to the clinic joined in bringing a class action against the Abortion Abolition Society, individual members of the Society, and the cities of Dallas and Mesquite, Texas. The contentions against the Society and its members, whom we refer to collectively as the Society defendants, are founded on 42 U.S.C. § 1985(3). According to the plaintiffs, the Society defendants had entered into a religiously motivated conspiracy to deny the plaintiffs their rights of education, freedom of choice, privacy, and travel. The plaintiffs alleged that members of the Society had threatened, harassed, intimidated, and assaulted them while they were seeking family planning or abortion services. Plaintiffs also appended state tort claims of assault, battery, trespass, defamation, intentional infliction of emotional distress, and interference with business relationships against the Society defendants.

The claims against the two cities, Dallas and Mesquite, were based on 42 U.S.C. § 1983, alleging that both cities, because they do not support abortion, intentionally had failed to provide police protection to the plaintiffs and had allowed the Society defendants to violate the constitutional rights of the plaintiffs by not impeding the unlawful acts of the Society defendants. The plaintiffs alleged in addition that the City of Mesquite had actually "encouraged the Defendants by making statements such as 'keep up the good work.' "

The Society defendants moved, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the suit for failure to state a claim for which relief can be granted, on the ground that the plaintiffs do not constitute a class protected by § 1985(3). While the motion was pending, the plaintiffs filed a motion to certify "their action as a class action" under Federal Rule of Civil Procedure 23, which is of course a different kind of class determination. The Society defendants filed a motion to stay discovery pending determination of both motions and discovery was stayed save for "facts relevant to certification of the alleged class."

The City of Dallas then filed a brief in opposition to the plaintiffs' motion for class certification on the ground that the class failed to meet the requirements of Rule 23, apparently construing the class-certification motion as embracing certification of a class for the § 1983 claims against the city defendants.

Holding that "§ 1985(3) will not permit the allowance of a class based on 'an animus directed at the class of persons who do not share Defendants' religious beliefs about abortions,' " the district court dismissed all of plaintiffs' claims against the Society defendants, both their constitutional claims and their pendent state-law claims.

Before taking this action, the court had entered a temporary restraining order requiring Dallas to enforce the Texas Penal Code with respect to offenses against the clinic located in that city. Subsequently, the plaintiffs settled their § 1983 claims against Dallas and submitted the settlement to the district court for approval under Rule 23(e) because of the class action allegations in the complaint. The court declined to approve the settlement between the plaintiffs and Dallas on the ground that the plaintiffs had made their class allegations only against members of the Society and those claims had now been dismissed.

The court dismissed Mesquite as a defendant, observing that Mesquite had conceded plaintiffs' entitlement to injunctive relief but not to the claims for damages. Mesquite had further asked to be realigned as a plaintiff for purposes of the injunctive relief against the other defendants. This request was not opposed and was therefore granted. Since the granting of this motion left Mesquite as both plaintiff and defendant in the same suit, the court dismissed the remaining claims against Mesquite without prejudice. On appeal, Mesquite does not challenge the district court's dismissal of the Society and its members as defendants. Consequently, it no longer takes a position as plaintiff but seeks only to defend the dismissal of plaintiffs' damages claim, on the ground that it had no duty to protect the plaintiffs from the conduct of the Society defendants.

II.

In reviewing the dismissal of a complaint for failure to state a claim, "[w]e must accept all well pleaded averments as true and view them in the light most favorable to the plaintiff. We will not go outside the pleadings and we cannot uphold the dismissal 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' "[1]

III.

[1] Section 1985(3) prohibits private conspiracies to deprive persons or classes of persons of the equal protection of the laws or of equal privileges and immunities under the laws,[2] but, as held by the Supreme Court, in *United Brotherhood of Carpenters, Local 610 v. Scott,*[3] it does not itself provide any substantive rights. Instead, the rights, privileges, and immunities protected by § 1985(3) "must be found elsewhere."[4] Section 1985(3) does not, therefore, protect individuals against private efforts to encroach on constitutional rights, such as first amendment rights or privacy rights, that restrain only official conduct.[5] Moreover, as the Court held in *Griffin v. Breckenridge,*[6] the statutory reference to equal protection or equal privileges and immunities means that the actions of the conspirators must be motivated by a *class-based,* invidiously discriminatory animus.[7]

---

[1] *Rankin v. City of Wichita Falls, Texas,* 762 F.2d 444, 446 (5th Cir.1985) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)).

[2] 42 U.S.C. § 1985(3) (1982) reads in part: If two or more persons ... conspire ... for the purpose of depriving ... any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... the party so injured or deprived may have an action for the recovery of damages ....

[3] 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983).

[4] *Id.* at 833, 103 S.Ct. at 3358.

[5] *Id.* 103 S.Ct. at 3358-59.

[6] 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

[7] *Id.* at 102, 91 S.Ct. at 1798.

"The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all."[8]

The plaintiffs have alleged that the Society defendants' actions violated rights protected by § 1985(3): the right to travel guaranteed by the federal Constitution[9] and the right to equal exercise of their right to choose to have an abortion. Because the issue was not discussed by the district court or raised in the briefs, we assume for present purposes, without deciding, that the "right to equal exercise of the right to choose" an abortion is protected by §1985(3). In that event, the sufficiency of the complaint must turn on whether it can be construed to allege a class-based animus, that is a prejudice against a group of persons or against a particular person because of his membership in that group.

The circuit courts of appeal have consistently held that religious ill-will is one of the class-based biases covered by § 1985(3).[10] The Society defendants contend that the Supreme Court's opinion in *Carpenters* undermines these holdings and that the legislative history of § 1985(3) does not reflect a congressional intent to extend § 1985(3) beyond racial discrimination. The *Carpenters* opinion, however, reserved judgment on this question although the Court did state, "it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans."[11] Following the course there taken by the Court, we do not decide whether § 1985(3) prohibits religious discrimination because, even assuming that it does,

---

[8]*Id.*

[9]*Carpenters*, 463 U.S. at 832, 103 S.Ct. at 3358; *Griffin*, 403 U.S. at 105, 91 S.Ct. at 1800.

[10]*See, e.g., Colombrito v. Kelly*, 764 F.2d 122, 130-31 (2d Cir.1985); *Taylor v. Gilmrtin*, 686 F.2d 1346, 1357-58 (10th Cir.1982), *cert. denied*, 459 U.S. 1147, 103 S.Ct. 788, 74 L.Ed.2d 994 (1983); *Ward v. Connor*, 657 F.2d 45, 48 (4th Cir.1981), *cert. denied*, 455 U.S. 907, 102 S.Ct. 1253, 71 L.Ed.2d 445 (1982).

[11]463 U.S. at 836, 103 S.Ct. at 3360.

the plaintiffs have not stated a claim of discrimination against a class of persons because of their religion.

As the *Griffin* Court noted, when Congress enacted § 1985(3), it did not intend to reach all tortious conspiracies that interfere with the rights of others even if the rights were derived from the Constitution. Instead, it sought to prevent conspiracies based on "invidiously discriminatory motivation," plans designed with the intention of depriving some racial group or other class of persons of "*equal* protection, or *equal* privileges and immunities."[12] To constitute a class within the meaning of this section, the members of the protected group must therefore share at least some common characteristic beyond simply being victims of a conspiracy, a common characteristic that distinguishes the class from the rest of the population.[13]

Thus in *Griffin,* the class affected consisted of blacks and persons who were, or who were believed to be, out-of-state civil rights workers.[14] In *Carpenters,* in which the Court held that an economic group, those who preferred not to be associated with unions, was not the type of class shielded by § 1985(3),[15] the majority opinion emphasized the class-based nature of § 1985(3). Explaining its decision, the *Carpenters* Court summed up that part of the legislative history supporting the position that § 1985(3) was intended to protect classes sharing a political belief. While pointing out that the legislation finally passed was the House bill, it quoted the broadest statement made during the Senate debate: "if a conspiracy were formed against a man 'because *he* was a Democrat, if you please, or because *he* was a Catholic, or because *he* was a Methodist, or because *he* was a Vermonter,

---

[12]*Griffin,* 403 U.S. at 102, 91 S.Ct. at 1798.

[13]*Scott v. Moore,* 680 F.2d 979, 1017 (5th Cir.1982) (en banc) (Rubin, J. and Williams, J., dissenting), *rev'd sub nom. United Brotherhood of Carpenters, Local 610 v. Scott,* 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983); *Askew v. Bloemker,* 548 F.2d 673, 678 (7th Cir.1976).

[14]403 U.S. at 90-91, 91 S.Ct. at 1792-93.

[15]463 U.S. at 837-38, 103 S.Ct. at 3360-61.

. . . then this section could reach it.' "[16] The Court then added: "Even if the section must be construed to reach conspiracies aimed at any class or organization on account of *its* political views or activities," it found no support for interpreting the statute "to reach conspiracies motivated by bias towards others on account of *their economic* views, status, or activities."[17] While the dissenters thought the section should reach the nonunion class involved, they too based their interpretation on the common characteristics of that group:

> As an initial matter, the intended victims must be victims not because of any personal malice the conspirators have toward them, but because of *their membership in or affiliation with a particular class. Moreover, the class must exist independently of the defendants' actions;* that is, it cannot be defined simply as the group of victims of the tortious action."[18]

The class protected by § 1985(3) is thus defined by the characteristics of those at whom the conspiracy is aimed, not by the beliefs of the conspirators.

Even those courts that have applied the section to religious discrimination have extended protection only to plaintiffs who were singled out because of their membership in a particular minority or fringe religious group.[19] The class is defined by the common religious characteristics of the victims of the conspiracy. Other courts have required that

---

[16]*Id.* at 836-37, 103 S.Ct. at 3360 (quoting Senator Edmunds' statement, Cong.Globe, 42d Cong., 1st Sess., 567 (1871)) (emphasis added).

[17]*Id.*, 103 S.Ct. at 3360-61 (emphasis added except as to word "economic").

[18]*Id.* at 850, 103 S.Ct. at 3367 (Blackmun, J., dissenting) (emphasis added) (citations omitted). *See also Note, Conspiracies to Deny Civil Rights: Using Section 1985(3) to Control Labor Violence,* 56 S.Cal.L.Rev. 1079, 1089 (1983) (authored by Edward A. Kazmarek); Case Note, *The Demise of Section 1985(3); United Brotherhood of Carpenters and Joiners of America v. Scott,* 18 Suffolk U.L.Rev. 453, 472 (1984) (authored by Ellen Petersen Otis).

[19]*Taylor,* 686 F.2d at 1357-58; *Ward,* 657 F.2d at 48.

the class have at least an "intellectual nexus." For example, the Eighth Circuit held in *Means v. Wilson*[20] that "there must exist an identifiable body with which the particular plaintiff associated himself by some affirmative act. . . . [I]t must have an intellectual nexus which has somehow been communicated to, among, and by the members of the group."[21]

The plaintiffs argue that the class in this case consists of those people who do not agree with the Society defendants' point of view. The class test is turned on its head, however, if a class is defined as all those who are not of the same class as the conspirators, for example, all those who do not believe in a specific religious faith or political party — or all those who do not have a religiously based opposition to abortion.[22] Logic may define as two separate classes "we" — all those who share a certain belief — and "they" — all those who do not hold that tenet —, but § 1985(3) is aimed at an animus against those who have the despised trait. In this case, the plaintiffs do not limit the defendant class to persons who are members of a particular religious denomination but describes them only by their adherence to a specific belief that transcends denominational religious lines. Correspondingly, the plaintiffs define themselves only as "persons who do not share defendants' religious beliefs about abortion," which is no more a common trait or characteristic than would be a belief in using seat belts or in an ever-expanding universe.

Although — or perhaps because — the Fifth Circuit opinion in *Carpenters* (sub nom. *Scott v. Moore*)[23] was reversed by the Supreme Court, the plaintiffs seek to find some support for their position in phrases taken from the

---

[20]522 F.2d 833 (8th Cir.1975, *cert. denied,* 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364 (1976).

[21]*Id.* at 839-40.

[22]*Alexander v. Unification Church of America,* 634 F.2d 673, 678 (2nd Cir.1980).

[23]680 F.2d 979 (5th Cir.1982) (en banc).

dissent from the Fifth Circuit opinion. That dissent observed, however, that a § 1985(3) class is composed of "those having common characteristics of an inherent nature; that is, classes accorded special protection by the equal protection clause of the fourteenth amendment and 'the kinds of classes Congress was trying to protect when it enacted the Ku Klux Klan Act.' "[24] Explaining further, the dissent added, "[n]ot only must the class share some common characteristic beyond simply being victims of a conspiracy, but it must also be distinguishable from the general populace by this characteristic."[25] Indeed, in a decision about whose merits we need not now express a view, the Fourth Circuit has limited the section to racially-motivated discrimination and held that it does not protect Republicans as a class.[26]

It is not always easy to distinguish between discrimination based upon what the victims are thought to be or to believe and discrimination based upon what the victims are thought *not* to be or believe. Racial discrimination, for example, may be characterized either as discrimination against blacks, Hispanics, Asiatics, or native Americans by whites or as discrimination against all non-whites by whites. In such cases, however, the distinguishing racial, religious, or other characteristic of the class may be found not only in the defendants' minds but also in shared characteristics or putative characteristics of the class. No common unity of either religious denomination or faith characterizes those who seek, provide, or advocate a woman's freedom to choose an abortion. Advocacy of, or participation in, abortion may be motivated

---

[24]*Id.* at 1016 (Rubin, J. and Williams, J., dissenting) (quoting *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 347 & n. 9 (5th Cir.) (en banc), *cert. denied*, 454 U.S. 1110, 102 S.Ct. 687, 70 L.Ed.2d 651 (1981)).

[25]*Id.* at 1017 (Rubin, J. and Williams, J., dissenting). *Compare Kimble*, 648 F.2d at 347.

[26]*Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155 (4th Cir.1985) (citing a number of circuit court decisions interpreting § 1985(3)). *See also* Note, *Republicans as a Protected Class?:* Harrison v. KVAT Food Management, Inc. *and the Scope of Section 1985(3)*, 36 Am.U.L.Rev. 192 (1986) (authored by Daniel E. Durden).

by convictions other than religious principles, and the plaintiffs do not contend that they have singled out from other pro-abortion individuals because of their religious beliefs. It is indeed a matter of common knowledge that some persons who adhere to religious denominations whose tenets oppose abortion hold views contrary to the dogma of their faith. The plaintiffs' construction of § 1985(3) is unnecessary to protect individuals from the denial of equal rights because of their religious beliefs. Instead of eliminating religious inequality, in fact, plaintiffs' construction of § 1985(3) might create it. Anti-abortion activists would be singled out as potential § 1985(3) defendants only if their opposition were animated by religious beliefs.

Plaintiffs liken the issue raised by their complaint to the question involved in *Shaare Tefila Congregation v. Cobb,*[27] a case in which the Supreme Court has granted a writ of certiorari.[28] In *Shaare Tefila,* the question before the Court is whether another civil rights statute, the Civil Rights Act of 1866, now codified as 42 U.S.C. § 1982 (1982), which assures all citizens the same right to hold property as white citizens, may be invoked by Jews, on the basis that, even though those who adhere to Judaism are not a racial group, the defendants perceive members of that religious faith to be a race.[29] In *Shaare Tefila,* the distinguishing feature, Judaism, is a characteristic of the plaintiffs whether it is viewed as a religion or a race so the issue is plainly dissimilar even if the differences between the statutes involved are ignored.

Because plaintiffs do not form a class protected by § 1985(3), it is unnecessary for us to consider whether the allegation that the defendants' acts were intended to deprive some citizens of the right to travel interstate sufficed to state the kind of federal constitutional right protected by

---

[27]785 F.2d 523 (4th Cir.1986).

[28]— U.S. —, 107 S.Ct. 62, 93 L.Ed.2d 21 (1986).

[29]55 U.S.L.W. 3197-98 (Oct. 7, 1987) (No. 85-2156).

§ 1985(3),[30] or whether, as contended by the defendants, it was inadequate because "not aimed at transients."[31]

IV.

[3] Whether the plaintiffs have stated a Rule 23 class-action basis for their suit against the two city defendants must be determined on the basis of the allegations of their complaint construed liberally, as required by Federal Rule of Civil Procedure 8.[32] The amended complaint is captioned "CLASS ACTION" on its first page. Following paragraph 5, the complaint contains a subhead: "CLASS ACTION ALLEGATIONS RE JANE ROE I AND JANE ROE II." Paragraph 6 then recites that both Jane Roes "are typical of a much larger class of women" who have suffered at the hands of the individual defendants. It states, in subparagraph (e), "[t]he questions regarding the respective rights and privileges of the parties both predominate over any individual questions and lend themselves to declaratory and injunctive relief against each of the Defendants."

The complaint does not therefore indisputably invoke Rule 23 against the cities, but neither does it negate a class-action claim. It is at worst ambiguous. The City of Dallas read the request for class certification to be directed against it, for it not only opposed the motion but did not suggest in its opposition that the complaint failed to set forth a class-action request against it.

The trial court did not accord the class-action allegations of the complaint the liberal interpretation such pleadings warrant. We therefore reverse the dismissal of the complaint as to the City of Dallas and remand for review of the settlement agreement and any other proceedings that may be appropriate consistent with this opinion.

---

[30] *Carpenters*, 463 U.S. at 832, 103 S.Ct. at 3358; *Griffin*, 403 U.S. at 105; 91 S.Ct. at 1800.

[31] *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7, 94 S.Ct. 1536, 1540, 39 L.Ed.2d 797 (1974).

[32] *Gresham Park Community Organization v. Howell*, 652 F.2d 1227, 1236 (5th Cir. Unit B 1981).

V.

[4] The district court dismissed the suit against the City of Mesquite because, at an earlier stage in the proceedings, the City had aligned itself with plaintiffs in their requests for injunctive relief against the Society defendants while continuing to challenge the requests for damages against itself. Consequently, in the same suit, the City would be both plaintiff pressing some claims and defendant opposing others. That situation no longer exists, and is therefore no reason for dismissal of the § 1983 claims against the City of Mesquite.

The City urges in its brief that the plaintiffs have failed to state a claim against it for which relief can be granted and that we should nonetheless affirm the dismissal on that basis if the ground on which the district court dismissed the suit against it is not sound. The district court did not rule on the sufficiency of the complaint and the plaintiffs do not ask us to uphold its adequacy. We therefore express no opinion on the matter.

For these reasons, we AFFIRM the dismissal of the § 1985(3) claim against the Abortion Abolition Society and its members, REVERSE the dismissal of the § 1983 claim against the City of Mesquite, REVERSE the dismissal of the § 1983 claim against the City of Dallas, and REMAND to the district court to take such further action as may be appropriate consistent with this opinion.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

CA3-85-0577-R

JANE ROE I, JANE ROE II, on behalf of themselves and all others similarly situated, J. HARVEY JOHNSON III, WILLIAM W. WEST, DALLAS MEDICAL LADIES CLINIC, CHOICE, BILLIE MUMFORD, IVA MARIE STEWART, MARIA FERNANDEZ, CAROLYN ROZEBOOM, ELIZABETH BLANTON, and DELORIS HENDRIX

vs.

ABORTION ABOLITION SOCIETY, WINSTON WILDER, BOB CARROLL, SUSAN HINSON, DAVID M. LYLES, ROB FARRELL, ROY FARRELL, GARY DAVIS, JOHN DOE, CITY OF MESQUITE and CITY OF DALLAS

MEMORANDUM OPINION AND ORDER

This suit was filed on March 21, 1985, on behalf of two doctors who provide abortions for persons desiring them, a corporation that runs an abortion clinic, a non-profit organization that escorts women to abortion clinic, employees of the corporation that runs the abortion clinic, and two "Jane Roe" plaintiffs, representing women who have had abortions and women who desire to have abortions. It sought declaratory and injunctive relief against the Abortion Abolition Society, seven individual defendants, and one "John Doe" defendant — who basically, were alleged to have interfered with abortion clinics in Dallas and Garland, with a clinic previously operated in Mesquite, and with the persons who sought to use these clinics. Jurisdiction was alleged under 28 U.S.C. §1343, because of the claims that the asserted conspiratorial conduct of the defendants violated 42 U.S.C. §1985(3).[1]

[1]The complaint also alleged jurisdiction under 28 U.S.C. §1331 because the defendants supposedly interfered with certain constitutional rights of the plaintiffs. However, no jurisdiction exists under §1331 because no cause of action exists for alleged violations by *private parties* of another's constitutional rights. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The amended complaint filed April 24, 1985, named the City of Dallas and the City of Mesquite as defendants. The plaintiffs claimed that the cities had violated 42 U.S.C. §1983 by "failing to protect the security of persons such as plaintiffs" and by failing to protect "the exercise of constitutional rights and privileges by persons such as plaintiffs." In this amended complaint, the "Jane Roe" plaintiffs sought the certification of a class action under Rule 23(b)(2) and (3) on behalf of a class of women who have or will "suffer at the hands of the individual defendants" because of their anti-abortion activities.

On August 14, 1985, this Court entered a Temporary Restraining Order requiring the City of Dallas to enforce Texas Penal Code §§1.07(a)(12) and 30.05 with respect to the abortion clinic at 1625 Mockingbird Lane in Dallas. Subsequently, the plaintiffs and the City of Dallas entered into a settlement agreement — and requested this Court to approve the settlement because of the class action allegations in the plaintiff's complaint. *See McArthur v. Southern Airways, Inc.*, 556 F.2d 298 (5th Cir. 1977), *withdrawn and vacated on other grounds*, 569 F.2d 276 (5th Cir. 1978).

The defendants object to any class certification hearing or any proceeding to approve the plaintiff's settlement with the City of Dallas. They contend that this Court has no jurisdiction of the plaintiff's claims against them. For the reasons stated below, this motion to dismiss is GRANTED.

1. Individual and Organizational Defendants.

Basically, the plaintiff's claim that the "individual and organizational defendants" — the Abortion Abolition Society, the seven named defendants, and the "John Doe" defendant — are motivated by a *religious animus* in their conspiratorial anti-abortion activities. This religious animus, which the plaintiffs claim is prohibited by §1985(3), is claimed to be "an animus directed at the class of persons who do not share defendants' religious beliefs about abortion and the exercise of rights and privileges in order to

obtain abortion." Plaintiff's Brief in Opposition to Motion to Dismiss at 1-2. Because the defendants' motion to dismiss is for failure to state a claim under Rule 12(b)(6), this Court must assume — for purposes of this motion — that the "individual and organizational defendants" have entered into a conspiracy motivated by this religious animus.[2] *See Kaiser Alum. & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982).

However, as the defendants correctly argue, §1985(3) — the so-called "Ku Klux Klan" Act — has been interpreted as extending only to racially motivated conspiracies. *See Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) ("some racial, or perhaps otherwise class-based, invidiously discriminatory animus" required) and *id.* at 102 n. 9 (declining to decide whether anything but racial bias would suffice); *see also Great American Fed. S. & L. Ass'n v. Novotny*, 442 U.S. 366 (1979). Moreover, in light of the Supreme Court's recent reversal of the Fifth Circuit's disposition of *Scott v. Moore*, 680 F.2d 979 (5th Cir. 1982) (en banc), *rev'd sub nom. Carpenters v. Scott*, 463 U.S. 825 (1983), the continued vitality of those cases which held that religious-based animus may be condemned by §1985(3) is dubious, indeed.

In *Scott*, the Court rejected the Fifth Circuit's theory that economic animus could be sufficient for a cause of action under 42 U.S.C. §1985(3). *See Scott*, 463 U.S. at 837. The Court did not find it necessary to determine whether only racially motivated conspiracies would be permitted under §1985(3), but found that "it is a close question whether §1985(3) was intended to reach any class-based animus other than animus against Negroes and those who

---

[2]No allegation is made that the City of Dallas or the City of Mesquite joined in this conspiracy motivated by religious animus. *See* Rule 11, *Fed. R. Civ. P.* Instead, the plaintiffs allege that the "municipal defendants have been unable, unwilling, or reluctant to provide adequate protection" to them from the conspiracy and religion-based animus of the other defendants. *See* Plaintiff's Supplemental Brief in Opposition to Motion to Dismiss, pp. 2-3.

championed their cause, most notably Republicans. The central theme of the bill's proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power." *Id.* at 836. The Court considered and explicitly rejected legislative history broadly speaking of conspiracies formed against a man "because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist . . ." Cong. Globe, 42d Cong., 1st Sess., 567 (1871) (remarks of Sen. Edmunds). In doing so, the Court noted that these statements in the Senate were not controlling; the current form of §1985(3) originated in the House, rather than the Senate, and the amendment that narrowed the Act's terms by centering on the required animus was proposed, adopted, and debated in the House. *See Scott,* 463 U.S. at 837.[3]

After *Scott,* it is doubtful that the Supreme Court would approve of any class-based animus other than those based on race. Although the Fifth Circuit has not had occasion to interpret *Scott,* another circuit has. "In summary as to the *Scott* opinion, we find nothing therein to give an encouragement whatever to extend §1985(3) to classes other than those involved in the strife in the South in 1871 with which Congress was then concerned. In fact, from *Scott* we get a signal that the classes covered by §1985 should not be extended beyond those already expressly provided by the Court." *Wilhelm v. Continental Tile Co.,* 720 F.2d 1173, 1176 (10th Cir. 1983).

The cases relied upon by plaintiffs, as extending §1985(3) to a religious animus, are pre-*Scott* decisions. And, the cases cited by plaintiffs as embodying post-*Scott* religious animus are inapposite. In *Colombrito v. Kelly,* 764 F.2d 122 (2nd Cir. 1985), the court considered the reach of §1985(3) only in

---

[3]Indeed, the debates surrounding the adoption of the Ku Klux Klan Act fill hundreds of pages of the Congressional Globe; certainly, not each view expressed can be taken as a dispositive statement of the Act's meaning. *See A Construction of Section 1985(c) in Lights of its Original Purpose,* 46 U.Chi.L.Rev. 402, 408 (1979).

determining that the commencement of a suit was not frivolous on an allowance of attorneys' fees to a defendant; moreover, the court specifically stated that it applied the law as it stood in 1979 "at the time when Colombrito instituted the present suit." *Id.* at 130. *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474 (7th Cir. 1985), far from approving religious animus, reasserts that the animus requirement after *Scott* should be read "strictly." *Id.* at 1486. The Seventh Circuit did not consider religious animus, but only mentioned that religion had been found sufficient in the past, *id.;* indeed, the Seventh Circuit "was a pioneer in the process of contraction that has culminated in the Supreme Court's decision in *Scott.*" *Grimes v. Smith,* 585 F. Supp. 1084 (N.D. Ind. 1984) (Posner, C.J., sitting by designation). In *Trerice v. Summons,* 755 F.2d 1081 (4th Cir. 1985), the court recognized that the Fourth Circuit had, before *Scott,* recognized only racial and religious animus; but it did not reaffirm the validity of a religious animus, finding only that a class of military prisoners was not protected by §1985(3). *See id.* at 1085. Finally, in *Schultz v. Sundberg,* 759 F.2d 714 (9th Cir. 1985), the court merely stated the Ninth Circuit's unique view of extending §1985(3) past race only when a class can show its members warrant special assistance in protecting their federal rights, and noted that *Scott* "indicated that section 1985(3) probably did not extend to wholly political, non-racial conspiracies." *Id.* at 718. Accordingly, this Court concludes that the Supreme Court's narrowing perception of the proper construction of the class-based animus requirement of §1985(3) will not permit the allowance of a class based on "an animus directed at the class of persons who do not share Defendants' religious beliefs about abortion." The Ku Klux Klan Act was passed to combat egregious racial violence, and is apparently returning to the status of a mechanism to defeat racial discrimination.

For these reasons, the defendants' motion to dismiss is GRANTED, and the constitutional claims against the individual and organizational defendants are DISMISSED. The pendant state-law claims against those defendants must

also be DISMISSED. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

2. City of Dallas

As indicated above, the City of Dallas has reached a settlement agreement with the plaintiffs. Among other provisions, that agreement provides that the Temporary Restraining Order, entered by this Court on August 14, 1985, will "remain in effect as to the abortion clinic at 1625 West Mockingbird in Dallas.[4]

The plaintiffs and Dallas request court approval of this settlement agreement because of the class action allegations in the amended complaint. However, these class allegations are made only on behalf of a class allegedly injured by the conduct of the "individual defendants" — but the claims against the individual and organizational defendants are being dismissed by this opinion. Therefore, there is no need for any court approval of the settlement since the only remaining claims are those made by the plaintiffs against the two cities, Dallas and Mesquite, under §1983 for alleged failure to provide police protection.

The settlement between the plaintiffs and the City of Dallas, therefore, moots the claims made in the amended complaint against Dallas.

3. City of Mesquite

This means that the only remaining defendant in this case is the City of Mesquite. In its answer, Mesquite contends that the claims against it are moot because there was no abortion clinic in that city when this case was filed. This is not *necessarily* correct because certain of the plaintiffs could *allege* specific §1983 damages claims against Mesquite

---

[4]No temporary injunction hearing was held within ten days of the granting of the TRO, as required by Rule 65(b). Accordingly, the August 14 Temporary Restraining Order continued in effect only by agreement of the plaintiffs and the City of Dallas — not because of any action by this Court.

because of the destruction of the abortion clinic which was there and the claimed failure to protect that clinic (*see* Amended Complaint, pp. 14-15).

However, the Mesquite answer also concedes that the plaintiffs are entitled to all of the relief sought in paragraphs 1, 2, 3, and 5 of the plaintiffs' prayer for relief — and *Mesquite not only urges the Court to grant this relief, but also prays that it be realigned as a plaintiff for purposes of this relief.*[5] This request is not opposed, and it is GRANTED.

Obviously, this makes the City of Mesquite both a party plaintiff and a party defendant in this case — so that Mesquite would be suing itself as a plaintiff as to most of the relief sought (Prayer for Relief, ¶s 1, 2, 3, and 5), but it would be defending the suit as to the remaining claims for relief (Prayer for Relief, ¶s 4, 6, 7).

Although this situation is unusual, it is not without precedent. In *Lodi v. Lodi,* 173 Cal.App.3d 628, 219 Cal.Rptr. 117 (1985), the plaintiff Oreste Lodi brought suit against himself in a California state court.[6] When the defendant Lodi failed to file an answer, the plaintiff Lodi sought a default judgment. The trial judge refused to grant the default, and this was sustained on appeal:

> "As is obvious, the complaint states no cognizable claim for relief. . . . In the arena of pleadings, the one at issue here is a slam-dunk frivolous complaint.
>
> In the circumstances, this result cannot be unfair to Mr. Lodi. Although it is true that, as plaintiff and appellant, he loses, it is equally true that, as defendant and respondent, he wins! It is hard to imagine a more even-handed

---

[5]Mesquite, therefore, does not object to the settlement agreement between the plaintiffs and the City of Dallas.

[6]Lodi claimed that his birth certificate created a trust of all his assets. He sued himself, as beneficiary of this trust, seeking to terminate it so that he would finally have sole possession and control of his estate. He maintained these two different roles throughout the appeal, filing one brief as appellant and another brief as appellee.

application of justice. Truly, it would appear that Oreste Lodi is that rare litigant who is assured of both victory and defeat regardless of which side triumphs.

We have considered whether [Oreste Lodi] should be awarded his costs of suit on appeal, which he could thereafter recover from himself. However, we believe the equities are better served by requiring each party to bear his own costs on appeal."

This reasoning applies to the Mesquite remnants in this case. Therefore, in order to avoid the *Lodi* principle — and to avoid the spectacle of Mesquite suing itself — the claims of Mesquite (and the plaintiffs) against the City of Mesquite will be dismissed. However, this dismissal is without prejudice to the right of the plaintiffs to file a new §1983 lawsuit which names only the City of Mesquite as the defendant and which is limited to specific §1983 damages claims by the appropriate plaintiffs against Mesquite.[7]

ORDER

It is ORDERED that this case is DISMISSED in its entirety, but without prejudice to the right of the appropriate plaintiffs to file a new §1983 lawsuit against the City of Mesquite.

Signed this 16th day of April, 1986.

/s/ JERRY BUCHMEYER

JERRY BUCHMEYER
United States District Judge

[7]There are no limitations problems with any such new action against Mesquite. Therefore, although this Court could permit the filing of an amended complaint in this action, it is preferable to require a new lawsuit — one unencumbered with the background of the other defendants and other claims in this case — so that the dismissal of this case will become final, permitting an immediate appeal should any party desire to do so.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

NO. CA3-85-0577-R

CLASS ACTION

JANE ROE I, JANE ROE II, on behalf of themselves and all others similarly situated, J. HARVEY JOHNSON, III, WILLIAM W. WEST, DALLAS MEDICAL LADIES CLINIC, A TEXAS CORPORATION, CHOICE, A TEXAS CORPORATION, BILLIE MUMFORD, IVA MARIE STEWART, MARIA FERNANDEZ, CAROLYN ROZEBOOM, ELIZABETH BLANTON, AND DELORIS HENDRIX,

Plaintiffs,

V.

ABORTION ABOLITION SOCIETY, WINSTON WILDER, BOB CARROLL, SUSAN HINSON, DAVID M. LYLES, ROB FARRELL, ROY FARRELL, GARY DAVIS, JOHN DOE, CITY OF MESQUITE AND CITY OF DALLAS,

Defendants.

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, Jane Roe I, Jane Roe II, J. Harvey Johnson, III ("Dr. Johnson"), William W. West ("Dr. West"), Dallas Medical Ladies Clinic (the "Clinic"), Choice, Billie Mumford, Iva Marie Stewart, Maria Fernandez, Carolyn Rozeboom, Elizabeth Blanton, and Deloris Hendrix, by their attorneys, allege:

NATURE OF THE ACTION

1. This is an action for injunctive relief, for declaratory judgment confirming the rights of Plaintiffs, and for

damages, all predicated upon Defendants' depriving Plaintiffs of certain rights and privileges guaranteed under the Constitution of the United States and the laws of the State of Texas, to wit: the right and privilege of education with respect to family planning; the right and privilege of privacy and freedom of choice with respect to abortion; the right and privilege of travel both between states and within the state; the right and privilege of the pursuit of lawful activities and professions, and the right and privilege of acting in a manner consistent with one's own conscience. Plaintiffs also assert pendent claims of assault and battery, trespass, intentional infliction of emotional distress, tortious interference with business relationships, and defamation.

JURISDICTION

2. Plaintiffs' claims arise under 42 U.S.C. §§1983 and 1985(3) and under Amendments I, III, IV, V, IX and XIV of the Constitution of the United States. This Court's jurisdiction is founded upon 28 U.S.C. §§1331 and 1343, Article III of the Constitution of the United States, and pendent jurisdiction.

PLAINTIFFS

3. Plaintiff Jane Roe I is a female citizen of the United States and the State of Texas who has exercised her right and privilege of education, freedom of choice and privacy with respect to family planning or abortion, and in the exercise of such rights and privileges, has been subjected to overt threats, harassment, intimidation and abuse, both physical and verbal, by the individual defendants, because of her status as a person exercising her freedom of choice and privacy in favor of family planning or abortion.

4. Plaintiff Jane Roe II is a female citizen of the United States in the State of Texas who, because of her status desires to exercise her right and privilege of education, freedom of choice and privacy in favor of family planning or abortion but due to the overt threats, harassment, intimida-

tion and abuse of the individual Defendants, and the fear of such threats, harassment, intimidation, and abuse, has heretofore been impaired in her ability to exercise her right and privilege of education, freedom of choice and privacy in favor of family planning or abortion.

5. Both Jane Roes are actual persons, but wish to remain anonymous in the interest of avoiding further threats, harassment, intimidation, and abuse, both physical and verbal, by the individual Defendants or their supporters as a result of bringing the instant action.

CLASS ACTION ALLEGATIONS RE JANE ROE I AND JANE ROE II

6. Both Jane Roes are typical of a much larger class of women who reside both within and without the State of Texas who either have already suffered at the hands of the individual Defendants, or who justifiably fear the acts of individual Defendants, solely by reason of their desire to exercise their respective rights and privileges of education, freedom of choice and privacy in favor of family planning or abortion, and to exercise their rights and privileges of travel in order to further the exercise of the foregoing.

a. The class of such women is so numerous that joinder of each of them is impracticable.

b. Each of the women share the common questions of law and fact regarding their rights and privileges of education, freedom of choice, privacy and travel vis-a-vis the rights and privileges of others regarding speech.

c. The claims of Plaintiffs Jane Roe I and Jane Roe II are typical of the claims of the class.

d. Plaintiffs Jane Roe I and Jane Roe II are adequate representatives of the class. They and their attorneys will vigorously pursue this action on behalf of the class.

e. This action is maintainable as a class action under both F.R. Civ. P. 23(b)(2) and (b)(3). The questions regarding the

respective rights and privileges of the parties both predominate over any individual questions and lend themselves to declaratory and jnjunctive relief for the entire class against each of the Defendants, making a class action superior to other forms of process.

7. Plaintifs J. Harvey Johnson ("Dr. Johnson") and William West ("Dr. West") are both medical doctors who have been subject to overt threats, harassment, intimidation, and verbal abuses, both at their places of employment and at their personal residences, because of their decision in pursuit of their profession, to assist those women who have chosen to exercise education, freedom of choice, privacy and travel in favor of family planning or abortion.

8. Plaintiff Dallas Medical Ladies Clinic ("Clinic"), a Texas corporation, which operates at 1625 W. Mockingbird, #211, Dallas, Texas, and, until recently, operated at 3230 N. Highway 67 East, #107, Mesquite, Texas. Plaintiff Clinic exists for the purpose of providing family planning information to women who wish to exercise their right to education with respect to such matters. Plaintiff Clinic also exists for the purpose of providing information concerning abortion to those seeking to exercise their right and privilege of freedom of choice and privacy in an informed manner and to perform lawful pregnancy terminations for those who have chosen that alternative. Women from both within and without the State of Texas travel to the Plaintiff Clinic in order to further their exercise of the foregoing rights and privileges. Both locations operated by Plaintiff Clinic have been the site of the individual and organizational Defendants' activities, which have generally consisted of attempting to hinder and obstruct the lawful activities of Plaintiff Clinic. Plaintiff Clinic no longer operates at the Mesquite location, the facility having been destroyed by fire on or about February 22, 1985. The fire, known to have been caused by a deliberate act of arson, followed a series of threats of fire bombings received by the Mesquite Clinic. The Dallas Clinic has received an escalating number of bomb threats since the fire

at the Mesquite clinic. The Dallas Clinic fears a similar fate with attendant loss of property and perhaps life.

9. Plaintiff Choice is a non-profit Texas corporation, composed of volunteer citizens. To assist the exercise of the rights and privileges of education, freedom of choice, privacy and travel in favor of family planning or abortion. Plaintiff Choice provides escorts to accompany women who have chosen to use clinics in the greater Dallas area to ease the trauma and emotional turmoil such women undergo at the hands of the individual and organizational Defendants.

10. Plaintiffs Billie Mumford, Iva Marie Stewart, Maria Fernandez, Carolyn Rozeboom, Elizabeth Blanton, and Deloris Hendrix are medical nurses, directors, medical assistants, and counselors who are employed by Plaintiff Clinic, where their duties include educating patients in family planning and assistance with lawful and medically approved and supervised pregnancy termination. Certain of said Plaintiffs have been subject to overt threats, harassment, intimidation and abuse, both verbal and physical, at their place of employment and, in some instances, at their personal residences, because of their decision to assist those women who have chosen to exercise their rights and privileges of education, freedom of choice, privacy and travel in favor of family planning or abortion. Said Plaintiffs desire to assist persons who have chosen to exercise their rights and privileges of education, freedom of choice, privacy and travel. Said plaintiffs are typical of a much larger class of professionals engaged in family planning and abortion services, who have been subject to overt threats, harassment, intimidation, and physical and mental abuse, throughout the United States, solely by reason of their desire to engage in their profession of providing a constitutionally protected service.

DEFENDANTS

11. The individual and organizational Defendants have conspired and acted in concert with one another to further their religious animus in an effort to eradicate all family

planning and pregnancy termination facilities, including Plaintiff Clinic, and to that end have conspired and acted in concert to humiliate, embarrass, and otherwise obstruct the actions of Plaintiffs in: (1) seekings, providing, or offering to provide education in family planning; (2) seeking, performing, or offering to perform lawful pregnancy terminations; (3) seeking, engaging in, or offering to engage in private professional-client relationship; and (4) seeking to exercise or exercising the rights of travel in order to exercise the foregoing.

12. Defendant Abortion Abolition Society is an organization dedicated on religious grounds to the eradication of clinics for pregnancy termination. The organizers of said group are Winston Wilder and Bob Carroll. Defendants Abortion Abolition Society, Winston Wilder, and Bob Carroll may be served with process at 6855 Scyene Road, Dallas, Texas. Defendant Susan Henson may be served with process at 10243 White Elm, Dallas, Texas. Defendant David M. Lyles may be served with process at 5149 Richard Ave., Dallas, Texas. Defendant Rob Farrell may be served with process at 4911 Shadywood Lane, Dallas, Texas. Defendant Roy Farrell may be served with process at 1701 No. Greenville Ave., Dallas, Texas or 2208 Owens Blvd., Dallas, Texas. Defendant Gary Davis may be served with process at 1280 Union Bank & Trust Tower, 5950 Berkshire Lane, L.B.-14, Dallas, Texas.

13. Defendant John Doe is typical of all other individuals and organizations who have repeatedly come to the locations operated by Plaintiff Clinic, to the office of Dr. Johnson, and to the homes of Dr. Johnson and Dr. West, where said Defendant and others, to further their religious animus, have harassed, humiliated, embarrassed, physically and verbally abused, reviled, and threatened Plaintiffs because of Plaintiffs' exercise of their respective rights of and privileges of education, freedom of choice, privacy and travel with respect to family planning or abortion, and contrary to the manner in which Defendants have exercised (or would choose to exercise) their own freedom of choice. Defendant

John Doe is typical of a class of persons who have repeatedly come to the clinic locations for the aforesaid purposes and may be personally served by posting at the location of the Dallas Clinic, 1625 W. Mockingbird, #211, Dallas, Texas.

14. Defendants City of Mesquite and City of Dallas are home-rule cities under the laws of the State of Texas. Said Defendants have duties under the laws of the State of Texas and federal law to protect the security of persons such as Plaintiffs, to protect the exercise of constitutional rights and privileges by persons such as Plaintiffs, and to treat persons such as Plaintiffs in a non-discriminatory manner.

SITUS OF UNLAWFUL ACTIVITY

15. Defendants have engaged in unlawful conduct as herein described at five principal locations:

(a) At the Clinic operated by Dallas Medical Ladies Clinic, located at 1625 W. Mockingbird, Dallas, Texas (the "Dallas Clinic");

(b) At the clinic formerly operated by Dallas Medical Ladies Clinic, previously located at 3230 N. Highway 67 East, #107, Mesquite, Texas (the "Mesquite site");

(c) At the office of Dr. Johnson, where Dr. Johnson is engaged in the lawful practice of medicine with other physicians, located at 2201 Forest Lane, Garland, Texas (the "OB-GYN office");

(d) At the personal residence of Dr. Johnson, 8723 Middle Downs, Dallas, Texas (the "Johnson home"); and

(e) At the personal residence of Dr. West, 5725 Valley Mills Drive, Garland, Texas (the "West home").

ACTS OF DEFENDANTS

16. Among other things, the individual and organizational Defendants have, to further their religious animus, commit-

ted the following overt acts in furtherance of their conspiracy against the rights and privileges of Plaintiffs:

	Description	Location
(a)	Blocking the driveway to the parking lot and standing in front of cars trying to park;	Dallas Clinic; Mesquite site
(b)	Blocking, with vehicles or their persons, the parking spaces in the lot reserved for employees and patrons of the business;	Dallas Clinic; Mesquite site
(c)	Blocking the doors of patients' vehicles (Jane Roe I and Jane Roe II) to prevent the occupants from leaving their automobiles and entering the Clinic for scheduled appointments;	Dallas Clinic; Mesquite site
(d)	Opening the doors of patients' vehicles (Jane Roe I and Jane Roe II) as soon as their vehicles have been parked;	Dallas Clinic; Mesquite site
(e)	Converging upon Plaintiffs as they got out of their cars, hovering over them, and surrounding them as they attempt to walk to the clinic;	Dallas Clinic; Mesquite site
(f)	Confronting Plaintiffs in an abusive manner to frighten, intimidate and engender guilt in them;	Dallas Clinic; Mesquite site

	Description	Location
(g)	Harassing patients by making statements such as "Are you going to kill your baby?", "Why are you allowing them to murder your baby?"	Dallas Clinic; Mesquite site
(h)	Grabbing, shoving, and hitting the arms of certain Plaintiffs to prevent them from entering clinic;	Dallas Clinic; Mesquite site
(i)	Blocking the clinic doorway with their bodies and pacing backward and forward in front of the doorway in a manner designed to block ingress and egress;	Dallas Clinic; Mesquite site
(j)	Blocking the sidewalk in front of and adjacent to the clinic;	Dallas Clinic; Mesquite site
(k)	Copying license plates of patients in a concerted effort to harass and intimidate the patients, and perhaps call upon them at a later time;	Dallas Clinic; Mesquite site
(l)	Picketing and displaying signs of defamatory nature; accusing various Plaintiffs of "murder", "killing", and operating a "slaughterhouse";	Dallas Clinic;; Mesquite site; OB-GYN office, West home
(m)	Shouting slanderous statements at Plaintiffs by charging them with committing the crime of "murder";	Dallas Clinic; Mesquite site; OB-GYN office, West home

	Description	Location
(n)	Trespassing upon private property by posing as patients and threatening to destroy personal property situated thereupon;	Dallas Clinic; Mesquite site
(o)	Threatening the physical well-being of Choice volunteers by physically grabbing them on the shoulders and arms, and making statements such as "The only good volunteer is a dead volunteer" and that volunteers are "murderers.";	Dallas Clinic; Mesquite site
(p)	Threatening the security guard employed by the Clinic by making statements such as "You had better find a different place to work.";	Dallas Clinic
(q)	Threatening to destroy the partnership between Dr. Johnson and other physicians with whom he practices medicine.	OB-GYN office

17. Plaintiffs justifiably fear that the Dallas Clinic, OB-GYN office, West home, and Johnson home, may meet the same fate as the Mesquite site. Shortly before the fire at the Mesquite clinic, the demonstrators became increasingly aggressive and more violent. By way of example, on January 26, 1985, certain individual Defendants approached Plaintiff Jane Roe I, shook a Bible in her face, shouted at her and physically prevented her from opening the door to the Mesquite clinic, despite several requests from Plaintiff to leave her alone. As Plaintiff continued to try to enter the clinic, an individual Defendant grabbed Plaintiff's arm, hit her several times, and pushed her backwards into the clinic door while shouting that she was killing her baby. Plaintiff

Jane Roe I suffered bruises on her arm where said Defendant had grabbed and hit her. Said Defendant pushed and crowded Plaintiff to the extent that it caused her to fall into the clinic when someone from inside opened the door. The Mesquite Police Department, acting on behalf of Defendant City of Mesquite, sent two officers to the clinic to investigate the incident. The officers refused to prepare an official report despite receiving numerous requests to do so. The officers also encouraged the Defendants by making statements such as "keep up the good work." Shortly thereafter, the Mesquite clinic began to receive bomb threats on the telephone. On one occasion, after a bomb threat was reported, the Mesquite Police Department informed the clinic representative to "look for the bomb herself." Since the fire at the Mesquite clinic, individual Defendants who were at the Mesquite site only days before it was destroyed, have moved to the Dallas clinic, where they continue to converge on Plaintiffs as they drive into the parking lot and try to walk to the clinic door, shout at Plaintiffs as they stand directly in front of them, and try to block the entrance to the clinic. Harassment of Plaintiffs at the Dallas Clinic has escalated tremendously since that time. This inexcusable conduct, accompanied with the overt acts described above, must be addressed by this Court to prevent the perpetuation of an atmosphere in which unlawful and destructive conduct are encourged.

18. Defendants City of Dallas and City of Mesquite have failed to provide, or have refused to allow the provision of, police protection for Plaintiffs adequate to protect them from the unlawful activities of the individual and organizational Defendants:

(a) Upon information and belief, it is the policy and practice of the Dallas and Mesquite Police Departments not to enforce the following statutes, and it is the policy and practice of the Dallas Police Department not to enforce the following ordinances, against the individual and organizational Defendants and other persons during such times as said Defendants and persons seek to interfere with the

availability, use, and provision of family planning and/or abortion services: Tex. Civ. Stat. art. 5154d (mass picketing); Tex. Penal Code § 22.01 (assault); *id.* § 22.07 (terroristic threat); *id.* § 30.05 (criminal trespass); *id.* § 42.04 (riot); *id.* 42.03 (disorderly conduct); Dallas City Code § 30-4 (a) (use of loudspeakers between 12 noon and 2:00 p.m.); *id.* 30-4 (b) (emission of loud and raucous noises); *id.* § 30-4 (c) (use of loudspeakers so as to cause congregation of crowds); *id.* § 51.6.102 (impermissible noise levels); upon information and belief, the Dallas Police Departments enforce said statutes and ordinances at other times.

(b) Upon information and belief, it is the policy and practice of the Dallas and Mesquite Police Departments not to allow its officers to work off-duty for any clinic that offers women family planning and/or abortion services; it is the policy and practice of the Dallas Police Department to allow its officers to work off-duty for banks, grocery stores, hamburger shops, and other businesses.

(c) Upon information and belief, it is the policy and practice of the Dallas and Mesquite Police Departments not to station sufficient numbers of on-duty police officers sufficiently close to clinics that offer women family planning and/or abortion services to protect Plaintiffs from Defendants' announced, clearly-stated and plain interference with Plaintiffs' constitutional rights, privileges, and immunities; upon information and belief, it is the policy and practice of the Dallas and Mesquite Police Departments to station sufficient numbers of on-duty police officers sufficiently close to other businesses and activities when similar interference is possible.

(d) Upon information and belief, the Dallas and Mesquite Police Departments, the City of Dallas and the City of Mesquite have refused to adopt, or failed to adopt, policies and practices that would protect Plaintiffs from Defendants' interference with Plaintiffs' constitutional rights and privileges.

(e) Upon information and belief, the Dallas and Mesquite Police Departments have failed adequately to train their police officers as to the rights, privileges, and immunities of the Plaintiffs and adequately to supervise their enforcement of the statutes and ordinances listed in 18(a) *supra*.

Upon information and belief, the Dallas and Mesquite Police Departments, the City of Dallas, and the City of Mesquite intentionally have pursued the above policies and practices so as not to be deemed supportive of the availability, provision and use of family planning and/or abortion services, nothwithstanding the fact that said services are not only lawful but constitutionally protected as fundamental rights of persons in this nation.

COUNT I
Violation of 42 U.S.C. §1985 (3)

19. Plaintiffs repeat and reallege paragraphs 1 through 18 and incorporate them by reference herein for all purposes.

20. To further their animus toward persons who hold religious views different from their own, the individual and organizational Defendants have conspired between and among themselves and other individuals and/or groups whose individual identity is not known to Plaintiffs, for the purpose of individually depriving the Plaintiffs, and each of them, of the free and equal exercise of their rights and privileges to privately and in consultation with their physicians choose abortion as a personal course of action (as distinguished from those persons who would exercise their rights and privileges of choice and privacy in favor of full-term pregnancy); from the free and equal exercise of their rights and privileges to educate themselves about matters of family planning; and from the free and equal exercise of their rights and privileges of travel; and because of such conspiracy have deprived Plaintiffs of the free and equal privileges guaranteed under the United States Constitution.

21. The conspiracy by and among the individual and organizational Defendants is a highly organized and concerted effort, as distinguished from sporadic, random or individual acts, which conspiracy is designed to further a particular religious point of view and to oppose those who hold different religious views. The organized efforts of the individual and organizational Defendants to impair and inhibit the fundamental constitutional rights of and privileges of freedom of choice, privacy, of education, and travel on the part of the Plaintiffs (as distinguished from those other persons who exercise their freedom of choice privacy, education and travel in favor of full-term pregnancy) is so massive that it cannot, without the aid of the judiciary, be effectively controlled or combatted by federal, state or local law enforcement agencies. Defendants' conspiracy thus deprives Plaintiffs of their co-equal rights to exercise their freedom of choice, privacy, education and travel in favor of family planning or abortion to the same extent as those persons choosing against family planning or abortion, as fully and effectively as though the deprevation were the result of organized or conscious state action.

22. The individual and organizational Defendants intend, among other things, to influence the decisions and holdings of state and federal legislative bodies, executive officers, and members of the judiciary, by bringing (or attempting to bring) humiliation, embarrassment and intimidation upon those who do not subscribe to such Defendants' religious beliefs, namely, those who would avail themselves of the right to choose family planning or abortion and travel in support thereof; upon those who would assist such persons in the implementation of that choice and travel in support thereof; and upon those other persons (both governmental officials and private citizens) who defend the fundamental right and privilege freely to choose abortion and travel in support thereof.

23. By virtue of the facts set forth herein, Plaintiffs are threatened with immediate and irreparable injury not redressable at law, including:

(a) Loss of the right and privilege to have constitutionally-guaranteed access to education with respect to family planning and other matters touching upon the private family relationship;

(b) Loss of the right and privilege to exercise constitutionally-guaranteed freedom of choice and privacy as to pregnancy termination, which right will otherwise be lost through passage of time alone;

(c) Loss of the right and privilege to exercise their constitutionally-guaranteed freedom to work as professionals in support of education, freedom of choice and privacy;

(d) Loss of the right and privilege to exercise their constitutionally-guaranteed freedom of travel in support of education, freedom of choice and privacy;

(e) Personal humiliation, embarrassment, and mental and emotional anguish, which injuries may not readily be calculated in monetary terms, and are not fully redressable by monetary means at all; and

(f) Loss of property and possibly the loss of life through violent acts of the individual and organizational Defendants or others acting in concert with them, which injuries are not readily calculable in monetary terms and are not fully redressable by monetary means at all.

COUNT II
Violation of 42 U.S.C. §1983

24. Plaintiffs repeat and reallege paragraphs 1 through 23 and incorporate them by reference herein for all purposes.

25. Defendants City of Dallas and City of Mesquite have breached their duties under the Texas and United States Constitutions to provide due process of law and equal protection of the laws and their duties under state law to provide adequate police protection, proper law enforcement and adequate training and supervision of police officers; as

a result, the City of Dallas and the City of Mesquite have caused Plaintiffs to be deprived of rights, privileges, and immunities secured to them by the Constitution, the laws of the United States, and the laws of Texas, both by their direct acts and, indirectly, by the acts of the individual and organizational Defendants.

COUNT III
Declaratory Judgment — 28 U.S.C. §2201

26. Plaintiffs repeat and reallege paragraphs 1 through 25 and incorporate them by reference herein for all purposes.

27. A real, substantial, and actual controversy exists between Plaintiffs and Defendants, each having adverse legal interests. Local law enforcement authorities have asserted that they are uncertain as to how to enforce the law with respect to Plaintiffs and Defendants alike. It is, therefore, necessary for this Court to render a Declaratory Judgment, defining the parameters under which both Plaintiffs and Defendants may exercise their constitutional rights without infringing on the rights of others. Irreparable injury as alleged herein will occur if the parties' respective rights are not clearly defined for their benefit, the benefit of the law enforcement authorities, and the benefit of our society as a whole.

COUNT IV
Assault and Battery

28. Plaintiffs repeat and reallege paragraphs 1 through 27 and incorporate them by reference herein for all purposes.

29. Certain individual Defendants have intentionally and knowingly caused bodily injury to certain Plaintiffs. Said Defendants have intentionally and knowingly threatened to cause bodily injury to certain Plaintiffs. These Defendants have engaged in physical contact and have acted in such a manner as to cause the apprehension of physical contact with respect to the person of certain Plaintiffs and their

property. The Defendants have, in fact, committed certain of the threatened acts hereinbefore mentioned, said action consisting of the unlawful and offensive touching of another. Plaintiffs have been damaged as a result of the assault and battery on their persons and property.

COUNT V
Trespass

30. Plaintiffs repeat and reallege paragraphs 1 through 29 and incorporate them by reference herein for all purposes.

31. Certain individual Defendants have intentionally and deliberately entered onto land to which said Defendants do not have title, without the consent of the party in possession. These Defendants have invaded and trespassed upon the property of the Dallas Clinic posing as patients. These Defendants have threatened to invade and trespass upon the property of the OB-GYN office and the West home. Plaintiffs have suffered damage as a result of the trespass on land and threatened trespass to personal property.

COUNT VI
Intentional Infliction of Emotional Distress

32. Plaintiffs repeated and reallege paragraphs 1 through 31 and incorporate them by reference herein for all purposes.

33. Certain individual Defendants have intentionally and knowingly threatened certain Plaintiffs with immediate bodily injury and have intentionally or knowingly caused physical contact with certain Plaintiffs. Said Plaintiffs have suffered mental distress by the actions of these Defendants, said actions often being accompanied by insulting and offensive words. Said Plaintiffs have experienced mental pain resulting from emotions such as grief, indignation, shame, despair, and public humiliation, for which they now seek redress.

COUNT VII
Tortious Interference with Business Relationships

34. Plaintiffs repeat and reallege paragraphs 1 through 33 and incorporate them by reference herein for all purposes.

35. By their actions, the individual Defendants have demonstrated a clear intention to interfere with the business relationships between or among the following persons:

(a) Between Plaintiffs Jane Roes I & II and Plaintiff Clinic;

(b) Between Plaintiffs Jane Roes I & II and Dr. Johnson & Dr. West;

(c) Between Plaintiff Clinic and Dr. Johnson & Dr. West;

(d) Between Dr. Johnson and his partners in the lawful practice of medicine at the OB-GYN clinic.

By their actions, said Defendants clearly are attempting to induce others to terminate or not to establish business relations with the Plaintiffs, said inducement being motivated solely by malice. These Defendants seek to cause injury to Plaintiffs and their actions amount to malicious and wanton interference with business relationships. Plaintiffs have been financially damaged by the Defendants' actions and Plaintiffs justifiably fear additional injury in the future, for which redress is now sought.

COUNT VIII
Defamation

36. Plaintiffs repear and reallege paragraphs 1 through 35 and incorporate them by reference herein for all purposes.

37. The individual Defendants have defamed Plaintiffs by making untrue statements which impute to the Plaintiffs the commission of "murder", "killing", and operating a "slaughterhouse". The statements do and are intended to affect certain Plaintiffs injuriously in their profession, business or occupation. On placards and written propaganda, said Defendants have libeled the Plaintiffs by impugning their integrity, reputation, and imputing the commission of

a crime, to wit, "murder". These Defendants do and intend to expose the Plaintiffs to public hatred, contempt, ridicule, and financial injury. All such statements, whether slander or libel, have been published to third persons with the intent that third persons accept such false statements as true. Plaintiffs have been damaged financially and emotionally by the actions of these Defendants.

PRAYER FOR RELIEF

WHEREFORE PREMISES CONSIDERED, Plaintiffs respectfully pray that the Court:

1. Enter a Preliminary Injunction and, thereafter, a Permanent Injunction, which allows the individual and organizational Defendants and all persons or entities acting in league or in concert with them to peaceably picket and demonstrate on the outer sidewalk adjacent to the street of the Dallas Clinic located at 1625 Mockingbird, Dallas, Texas, subject to the following conditions:

a. Defendants be enjoined from entering the parking area or onto the inner sidewalk adjacent to the building for purposes of disseminating literature or confronting any of the Plaintiffs, their employees, servants, patients, physicians, representatives, or other similarly situated;

b. Defendants be enjoined from blocking the driveway and other ingress or egress to and from the Dallas Clinic;

c. Defendants be enjoined from coming within ten (10) feet of any employee, servant, patient, physician, representative, or other person who may be entering or departing from the Dallas Clinic, unless the person gives prior consent;

d. Defendants be enjoined from copying the license plate numbers of any employee, servant, patient, physician, representative, or other person entering or departing from the Dallas Clinic;

e. Defendants be enjoined from maintaining more than ten (10) picketers, protesters, or demonstrators outside the Dallas Clinic at any one time;

f. Defendants be enjoined from assaulting or battering any employee, patient, physician, representative, servant, or other person who seeks to enter or depart from the Dallas Clinic;

g. Defendants be enjoined from disturbing the peace and solitude of the neighborhood at the Dallas Clinic;

h. Defendants be enjoined from attempting to interfere with the business relationships between or among the employees, servants, patients, physicians, representatives and other persons who seek to use the services of the Dallas Clinic;

i. Defendants be enjoined from defaming the Plaintiffs, by word or writing, in any way which suggests that the Plaintiffs are guilty of the commission of a crime, or intend to commit a crime, punishable under the laws of the State of Texas or of these United State, such as "murder", "killing", or operating a "slaughterhouse";

j. Defendants be enjoined from trespassing on real or personal property belonging to or leased by any of the Plaintiffs;

2. Enter a Preliminary Injunction and, thereafter, a permanent Injunction, which allows the individual and organizational Defendants and all persons or entities acting in league or concert with them to peaceably picket and demonstrate on the outer sidewalk adjacent to the street at the OB-GYN office located at 2201 Forest Lane, Garland, Texas, subject to the following conditions:

a. Defendants be enjoined from entering the parking area or onto the inner sidewalk adjacent to the building for purposes of disseminating literature or confronting any of the Plaintiffs, their employees, servants, patients, physicians, representatives, or other similarly situated;

b. Defendants be enjoined from blocking the driveway and other ingress or egress to and from the OB-GYN office;

c. Defendants be enjoined from coming within ten (10) feet of any employee, servant, patient, physician, represen-

tative, or other person who may be entering or departing from the OB-GYN office, unless the person gives prior consent;

d. Defendants be enjoined from copying the license plate numbers of any employee, servant, patient, physician, representative, or other person entering or departing from the OB-GYN office;

e. Defendants be enjoined from assaulting or battering any employee, servant, patient, physician, representative, or other person who seeks to enter or depart from the OB-GYN office;

f. Defendants be enjoined from disturbing the peace and solitude of the neighborhood at the OB-GYN office;

g. Defendants be enjoined from maintaining more than ten (10) picketers, protesters or demonstrators outside the OB-GYN office at any one time;

h. Defendants be enjoined from attempting to interfere with the business relationships between or among the employees, servants, patients, physicians, representatives, and other persons who seek to use the services of the OB-GYN office;

i. Defendants be enjoined from attempting to interfere with the business relationship between Dr. Johnson and his partners in the lawful practice of medicine;

j. Defendants be enjoined from defaming the Plaintiffs, by word or writing, in any way which suggests that the Plaintiffs are guilty of the commission of a crime, or intend to commit a crime, punishable under the laws of the State of Texas or of these United States, such as "murder", "killing", or operating a "slaughterhouse";

k. Defendants be enjoined from trespassing on real or personal property belonging to or leased by any of the Plaintiffs;

3. Enter a Preliminary Injunction and, thereafter, a Permanent Injunction, which allows the individual and organizational Defendants and all persons or entities acting in league or concert with them to peaceably picket and demon-

strate in public areas outside the West home (5725 Valley Mills Drive, Garland, Texas) and the Johnson home (8723 Middle Downs, Dallas, Texas) (collectively referred to as "the homes"), subject to the following conditions:

a. Defendants be enjoined from blocking the driveway and other ingress or egress to and from the homes;

b. Defendants be enjoined from coming within ten (10) feet of any person, who may seek to enter or depart from the homes, unless the person gives prior consent;

c. Defendants be enjoined from copying the license plate numbers of any person who may seek to enter or depart from the homes;

d. Defendants be enjoined from assaulting or battering any person who seeks to enter or depart from the homes;

e. Defendants be enjoined from disturbing the peace and solitude of the neighborhood at the homes;

f. Defendants be enjoined from maintaining more than five (5) picketers, protestors or demonstrators outside each home at any one time;

g. Defendants be enjoined from defaming the Plaintiffs, by work or writing, in any way which suggests that the Plaintiffs are guilty of the commission of a crime, or intend to commit a crime, punishable under the laws of the State of Texas or of these United States, such as "murder", "killing", or operating a "slaughterhouse";

h. Defendants be enjoined from trespassing on real or personal property belonging to or leased by any of the Plaintiffs;

4. Enter an Order authorizing the federal, state, and local law enforcement authorities to take whatever action is necessary to enforce the decrees of this Court.

5. Enter an Injunction against the City of Dallas and the City of Mesquite requiring them to correct the policies and practices described in paragraph 18.

6. Enter a Declaratory Judgment, decreeing the parameters under which the Defendants may exercise their rights without undue interference with the rights of Plaintiffs.

7. Enter Judgment for Plaintiffs in a monetary sum to compensate them for their injuries.

8. Award Plaintiffs costs and a reasonable attorney's fees pursuant to 42 U.S.C. §1988.

9. Grant Plaintiffs such other and further relief, both at law and in equity, to which Plaintiffs may show themselves to be justly entitled.

By: _____

Neil H. Cogan
Story Hall (SMU)
3315 Daniel Avenue
Dallas, Texas 75275
(214) 692-3249

Attorney for Plaintiffs, Jane Roe I, Jane Roe II, J. Harvey Johnson, III, William W. West, Dallas Medical Ladies Clinic, a Texas corporation, Choice, a Texas corporation, Billie Mumford, Iva Marie Stewart, Maria Fernandez, Carolyn Rozeboom, Elizabeth Blanton and Delores Hendrix

Of Counsel:

Jeffrey H. Abrams
G. Tomas Rhodus
3900 InterFirst One
Dallas, Texas 75202
(214) 748-0074

Lila Abrams
9938 Chimney Hill Lane
Dallas, Texas 75243

Mannette Dodge
6805 Hillcrest
Dallas, Texas 75205

Linda Hack
400 Katy Building
701 Commerce Street
Dallas, Texas 75202

Supreme Court, U.S.
FILED
AUG 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-50

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JANE ROE I, JANE ROE II, J. HARVEY JOHNSON, III, WILLIAM W. WEST, DALLAS MEDICAL LADIES CLINIC, CHOICE, BILLIE MUMFORD, IVA MARIE STEWART, MARIA FERNANDEZ, CAROLYN ROZEBOOM, ELIZABETH BLANTON, and DELORIS HENDRIX,

Petitioners,

v.

ABORTION ABOLITION SOCIETY, WINSTON WILDER, BOB CARROLL, SUSAN HINSON, DAVID M. LYLES, ROB FARRELL, ROY FARRELL, GARY DAVIS, JOHN DOE, CITY OF MESQUITE, and CITY OF DALLAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF PRIVATE RESPONDENTS ABORTION ABOLITION SOCIETY, WINSTON WILDER, BOB CARROLL, SUSAN HINSON, DAVID M. LYLES, ROB FARRELL, ROY FARRELL, GARY DAVIS, JOHN DOE

FRANK FINN
JAMES B. HARRIS*
3300 First City Center
1700 Pacific Avenue
Dallas, Texas 75201
(214) 969-1102

Lead Counsel for Private Respondents.

* *Counsel of Record*

Other counsel for Private Respondents are listed on the inside front cover.

August 17, 1987

Joseph F. Canterbury, Jr.
5550 LBJ Freeway
Dallas, Texas 75240
Attorney for Respondent Abortion Abolition Society

William D. Cox, Jr.
211 North Ervay Building
Suite 1004
Dallas, Texas 75201
Attorney for Respondent Susan Hinson

Harry Crutcher, III
514 One Turtle Creek Village
Dallas, Texas 75219
Attorney for Respondent Roy Farrell

Tim E. Kelley
5440 Harvest Hill Road
Dallas, Texas 75230-1698
Attorney for Respondent Rob Farrell

Robert T. Mowrey
3600 RepublicBank Tower
Dallas, Texas 75201-3959
Attorney for Respondent David M. Lyles

Lancaster Smith
810 South St. Paul & Cadiz
Dallas, Texas 75201
Attorney for Respondent Winston Wilder

Vernon O. Teofan
200 Lincoln Plaza
500 North Akard Street
Dallas, Texas 75201
Attorney for Respondent Bob Carroll

Thomas C. Unis
1200 One Main Place
P.O. Box 50100
Dallas, Texas 75250
Attorney for Respondent Gary Davis

QUESTION PRESENTED

Does 42 U.S.C. § 1985(3) allow a federal claim to be asserted against members of an alleged conspiracy directed at a "class" of individuals defined solely as those who are perceived to disagree with the religious beliefs of the alleged conspirators?

LIST OF PARTIES

Those parties listed in the petition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATUTE INVOLVED	2
COUNTERSTATEMENT OF THE CASE	2
I. COURSE OF PROCEEDINGS AND DISPOSITION IN COURTS BELOW	2
II. STATEMENT OF FACTS	3
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	5
I. PETITIONERS SEEK REVIEW ON AN ISSUE NOT ADDRESSED BY THE FIFTH CIRCUIT — WHETHER RELIGIOUS ANIMUS CAN SERVE AS A BASIS FOR A § 1985(3) CLAIM	5
II. THERE IS NO DISAGREEMENT AMONG THE COURTS OF APPEALS AS TO WHETHER RELIGIOUS ANIMUS CAN SERVE AS A BASIS FOR A § 1985(3) CLAIM	6
III. THE FIFTH CIRCUIT'S DECISION THAT PETITIONERS FAILED TO DESCRIBE THE "CLASS BASED" ANIMUS REQUIRED TO ESTABLISH A § 1985(3) CLAIM IS CONSISTENT WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS	8
CONCLUSION	11

TABLE OF AUTHORITIES

CASES:

	Page
Agarwal v. Regents of the University of Minnesota, 788 F.2d 504 (8th Cir. 1986)	7
Arnold v. Tiffany, 487 F.2d 216 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974)	8
Askew v. Bloemker, 548 F.2d 673 (7th Cir. 1976)	9
Colombrito v. Kelly, 764 F.2d 122 (2d Cir. 1985)	7
Novotny v. Great American Federal Savings & Loan Asso., 584 F.2d 1235 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979)	9, 10
Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 928, 93 L.Ed.2d 979 (1987)	6
Griffin v. Breckenridge, 403 U.S. 88 (1971)	8, 9, 10
Grimes v. Smith, 776 F.2d 1359 (7th Cir. 1985)	6
Harrison v. Brooks, 519 F.2d 1358 (1st. Cir. 1975)	8
Harrison v. KVAT Food Management, Inc., 766 F.2d 155 (4th Cir. 1985)	6
Lopez v. Arrowhead Ranches, 523 F.2d 924 (9th Cir. 1975)	9
McLean v. International Harvester Co., No. 86-2454, slip op. (5th Cir. June 2, 1987)	6
Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976)	8
Rayborn v. Mississippi State Board of Medical Examiners, 776 F.2d 530 (5th Cir. 1985)	6
Rodgers v. Tolson, 582 F.2d 315 (4th Cir. 1978)	8
Shaare Tefila Congregation v. Cobb, 55 U.S.L.W. 4629 (1987)	9
Silkwood v. Kerr-McGee Corp., 637 F.2d 743 (10th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981)	9
Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980)	9
United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825 (1983)	Passim
STATUTES:	
42 U.S.C. § 1982	9
42 U.S.C. § 1985(3)	Passim

No. 87-50

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JANE ROE I, JANE ROE II, J. HARVEY JOHNSON, III, WILLIAM W. WEST, DALLAS MEDICAL LADIES CLINIC, CHOICE, BILLIE MUMFORD, IVA MARIE STEWART, MARIA FERNANDEZ, CAROLYN ROZEBOOM, ELIZABETH BLANTON, and DELORIS HENDRIX,

Petitioners,

v.

ABORTION ABOLITION SOCIETY, WINSTON WILDER, BOB CARROLL, SUSAN HINSON, DAVID M. LYLES, ROB FARRELL, ROY FARRELL, GARY DAVIS, JOHN DOE, CITY OF MESQUITE, and CITY OF DALLAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF PRIVATE RESPONDENTS ABORTION ABOLITION SOCIETY, WINSTON WILDER, BOB CARROLL, SUSAN HINSON, DAVID M. LYLES, ROB FARRELL, ROY FARRELL, GARY DAVIS, JOHN DOE

Respondents, Abortion Abolition Society, Winston Wilder, Bob Carroll, Susan Hinson, David M. Lyles, Rob Farrell, Roy Farrell, Gary Davis, and John Doe, (collectively referred to as "Private Respondents"), respectfully pray that the Petition of Jane Roe I, et al. for a Writ of Certiorari to review the order and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled preceding on March 9, 1987, be denied.

STATUTE INVOLVED

42 U.S.C. § 1985(3) provides in pertinent part:

If two or more persons . . . conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . ., the party so injured or deprived may have an action for the recovery of damages . . .

COUNTERSTATEMENT OF THE CASE

I.

COURSE OF PROCEEDINGS AND DISPOSITION IN COURTS BELOW

The Original Complaint filed in this proceeding on March 21, 1985, alleged Private Respondents had conspired to deprive Petitioners, identified as those who sought, seek, or assist in providing abortions, of their fundamental right to freely choose abortion as a personal and private course of action. There was no suggestion in the Original Complaint that the alleged conspiracy was religiously motivated. The Original Complaint included claims for injunctive relief against Private Respondents in addition to damages, although Petitioners never sought a temporary restraining order or preliminary injunction directed to Private Respondents. The Original Complaint and two amended complaints also alleged numerous pendent state law causes of action against Private Respondents. On April 24, 1985, Petitioners filed an amended complaint defining as a new "class" motivating the alleged conspiracy "those who hold religious views different" from Private Respondents on the issue of abortion. Appendix at 34a ¶ 20; 35a ¶ 21.[1] A Second Amended Complaint was filed in July of 1985, further detailing claims against the City of Dallas and the City of Mesquite under § 1983.

[1] References to "Appendix" throughout this brief shall mean the Appendix to Petitioners' Petition.

On April 17, 1986, the District Court dismissed Petitioners Second Amended Complaint as against Private Respondents for failure to state a claim upon which relief can be granted.[2]

On November 4, 1986, the case was orally argued before the Honorable Judges, Rubin, Johnson and Jones of the Court of Appeals for the Fifth Circuit ("Fifth Circuit"). On March 9, 1987, the Fifth Circuit affirmed that portion of the District Court's decision dismissing Petitioners' claims against the Private Respondents.

In an opinion by Judge Rubin, the Fifth Circuit held Petitioners' Complaint did not satisfy one of the requirements for a § 1985(3) claim—that an alleged conspiracy be motivated by a "class" existing independently of conspiratorial conduct, i.e., a group other then simply victims of the alleged tortious activity. The Fifth Circuit *did not* decide whether a conspiracy motivated by religious ill-will and directed at an independent class would give rise to a claim under § 1985(3). The Fifth Circuit also *did not* decide whether individuals who are not members of an independent class, but who are identified with such a class could maintain a claim under § 1985(3).

II.

STATEMENTS OF FACTS

The Petitioners are two doctors who provide abortions, a corporation that runs an abortion clinic, a nonprofit organization that escorts women to abortion clinics, employees of the corporation that runs the abortion clinic, and two Jane Roe plaintiffs, representing women who have had abortions and women who desire to have abortions. Appendix at 24a—26a. The gravamen of Petitioners Second Amended Complaint was that Private Respondents improperly sought to interfere with

[2] The decision of the District Court did not reach the merits of Petitioners' pendent state law claims which could still be litigated in state court.

individuals seeking to have abortions or seeking to provide abortions. Private Respondents oppose abortions and seek to communicate their position through activities they believe are protected by the First Amendment to the United States Constitution.[3]

The one private respondent that is not an individual is the Abortion Abolition Society, characterized by Petitioners as a "religious society". Petition at 2. However, Petitioners Second Amended Complaint describes the group as an "organization dedicated on religious grounds to the eradication of clinics for pregnancy termination". Appendix at 27a ¶ 12. At most, this characterization suggests a group of individuals from various religious backgrounds who happen to share one common belief—abortion is wrong.

Petitioners have not alleged they have any particular religious views regarding abortion or that they practice a religion whose tenants condone abortion. Appendix at 24a—26a. Therefore, there is nothing about the specific religious beliefs of Petitioners, as a group, that has been alleged to motivate the activities of the Private Respondents. Rather, it is Petitioners' involvement in abortion activities that supposedly implies they have religious beliefs on the issue of abortion different from the Private Respondents.

[3] The District Court decided this case on a Motion To Dismiss. Therefore, no discovery was undertaken regarding the accuracy of Petitioners' description of Private Respondents' activities in opposing abortions. Private Respondents disagree with the characterization of their conduct in the Second Amended Complaint, and believe their activities were lawful and consistent with their First Amendment Rights.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Petitioners present two questions for review. To consider Petitioners' first question, the court would be proceeding without a decision on this issue by the Fifth Circuit. To decide the second question, when correctly stated, would require undoing a long line of consistent Court of Appeals precedent as well as decisions of this Court on that issue. Since each question provides an independent basis to dismiss Petitioners' claims against Private Respondents, both would have to be reviewed. However, even if both questions were decided in Petitioners' favor a third issue (also not decided by the Fifth Circuit, see Appendix at 11a—12a); whether Petitioners have alleged interference with the type of rights that could support a § 1985(3) claim, would still need to be answered before Petitioners could maintain an action based on § 1985(3).

I.

PETITIONERS SEEK REVIEW ON AN ISSUE NOT ADDRESSED BY THE FIFTH CIRCUIT—WHETHER RELIGIOUS ANIMUS CAN SERVE AS A BASIS FOR A § 1985(3) CLAIM

Petitioners argue that since this Court's decision in *United Brotherhood of Carpenters & Joiners v. Scott,* 463 U.S. 825 (1983) (hereinafter "*Carpenters*") it has been unclear what type of animus, other then racial, can serve as the basis for a claim under § 1985(3). They urge the Court to use this case as a vehicle for answering that question.

Petitioners conveniently overlook the fact the Fifth Circuit specifically declined to address the animus issue left open in *Carpenters,* and instead decided this case on another ground. Appendix at 6a—7a. Therefore, no conflict could possibly exist between the Fifth Circuit's decision in this case and the decisions of other Courts of Appeals or this Court on the animus issue, and review by this Court is unnecessary.

II.

THERE IS NO DISAGREEMENT AMONG THE COURTS OF APPEALS AS TO WHETHER RELIGIOUS ANIMUS CAN SERVE AS A BASIS FOR A § 1985(3) CLAIM

Petitioners assertion that the Courts of Appeals have been in conflict since *Carpenters* as to whether claims under § 1985(3) are limited to conspiracies based on racial animus is wrong. The decisions cited by Petitioners present a consistent pattern of understanding *Carpenters* as limiting claims under § 1985(3) to conspiracies involving racial animus. However, in none of the cited cases has a court specifically decided that a conspiracy motivated by religious animus cannot be the basis of a §1985(3) claim, since that fact issue has not been presented.

For instance, in three of the cases cited by Petitioners in support of claimed circuit disagreement, *Harrison v. KVAT Food Management, Inc.,* 766 F.2d. 155 (4th Cir. 1985), *Grimes v. Smith,* 776 F.2d 1359 (7th Cir. 1985), and *Gibson v. United States,* 781 F.2d 1334 (9th Cir. 1986) *cert. denied.* U.S. , 103 S.Ct. 928, 93 L.Ed.2d 979 (1987), each Court of Appeals suggested the reach of § 1985(3) had been narrowed after *Carpenters,* quite possibly to cases involving racial animus. However, the facts of each case involved alleged conspiracies based on political ill-will, and the specific holding of each case was whatever else the boundaries of § 1985(3) jurisdiction after *Carpenters,* politically motivated conspiracies could no longer serve as the basis for a claim.

Likewise, the two Fifth Circuit decisions cited by Petitioners, while discussing the contraction of § 1985(3) jurisdiction after *Carpenters,* do not involve a religious animus issue. For instance, in *Rayborn v. Mississippi State Board of Medical Examiners,* 776 F.2d 530 (5th Cir. 1985), the claimed conspiracy was alleged to be economically or commercially motivated. Similarly, in *McLean v. International Harvester Co.,* No. 86-2454, slip op. (5th Cir., June 2, 1987), limitations on the

reach of § 1985(3) were noted in the context of a claim that International Harvester had allegedly conspired to make the Plaintiff a scapegoat for criminal activity to which the company had plead guilty.

Petitioners incorrectly claim two post- *Carpenters* decisions hold a conspiracy motivated by religious animus can give rise to a § 1985(3) claim. In *Colombrito v. Kelly,* 764 F.2d 122, 130 (2d Cir. 1985), the Court of Appeals made it clear it was basing its decision on the law as it existed prior to the *Carpenters.* In that respect, *Colombrito* is consistent with pre- *Carpenters* decisions that recognized religious ill-will as a class-based bias that might be covered by § 1985(3). See Appendix at 6a. In Petitioners other claimed post- *Carpenters* religious animus case, *Agarwal v. Regents of the University of Minnesota,* 788 F.2d 504, 509-510 (8th Cir. 1986), the Court of Appeals did not address the issue of whether a conspiracy motivated by religious animus could give rise to a § 1985(3) claim because it concluded the Plaintiff had failed to establish the existence of any religious animus toward him.

In short, the cases relied upon by Petitioners do not show conflict requiring review by this Court. Rather, those cases establish a consistent pattern that prior to *Carpenters,* conspiracies based on religious ill-will could in certain circumstances support a § 1985(3) claim, that since *Carpenters* no Court of Appeals has directly faced the religious animus issue, and that a number of Courts of Appeals, in addressing the scope of § 1985(3), have interpreted *Carpenters* as restricting the types of claims that arise under § 1985(3).

III.

THE FIFTH CIRCUIT'S DECISION THAT PETITIONERS HAD FAILED TO DESCRIBE THE "CLASS BASED" ANIMUS REQUIRED TO ESTABLISH A § 1985(3) CLAIM IS CONSISTENT WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

Petitioners' assertion that the Fifth Circuit affirmed the District Court's decision on the basis that Petitioners had failed to establish they were members of a particular religious denomination is a mischaracterization of the Court of Appeals' holding.

The Fifth Circuit's decision is predicated on an understanding that to state a claim under § 1985(3) not only must a conspiracy be based on some type of invidiously discriminatory animus, but that animus must also be class based. It was this second requirement, that a claimed invidiously discriminatory animus must be class based, Petitioners failed to satisfy. On this basis, the Fifth Circuit affirmed the District Court's decision. Relying upon *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), and *Carpenters* at 836-838, 850, the Fifth Circuit noted:

> To constitute a class within the meaning of this section [1985(3)], the members of the protected group must therefore share at least some common characteristic beyond simply being victims of a conspiracy, a common characteristic that distinguishes the class from the rest of the population.

Appendix at 7a.

Numerous Court of Appeals decisions support this proposition. *Arnold v. Tiffany*, 487 F.2d 216, 218 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *Harrison v. Brooks*, 519 F.2d 1358, 1359-1360 (1st Cir. 1975); *Rodgers v. Tolson*, 582 F.2d 315, 317-318 (4th Cir. 1978); *Means v. Wilson*, 522 F.2d 833, 839-40 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976);

Lopez v. Arrowhead Ranches, 523 F.2d 924, 928 (9th Cir. 1975); *Askew v. Bloemker*, 548 F.2d 673, 678 (7th Cir. 1976); *Taylor v. Brighton Corp.*, 616 F.2d 256, 265 (6th Cir. 1980); *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743, 747-748 (10th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981).

Most recently this Court reached a similar conclusion in the context of a § 1982 claim. In *Shaare Tefila Congregation v. Cobb*, 55 U.S.L.W. 4629 (1987), the Court indicated agreement with the Court of Appeals for the Third Circuit that a class based animus does not exist where a Plaintiff is not a member of a racially distinct group but is merely perceived to be so by Defendants. If applied in the context of § 1985(3), this concept supports the Fifth Circuit's statement that a class for purposes of § 1985(3) must be defined by the characteristics of those at whom the conspiracy is aimed, not by the beliefs of the conspirators. Appendix at 8a.

Here, Petitioners define the class motivating the alleged conspiracy as those who do not share the religious beliefs of the alleged conspirators or as victims of the alleged conspiracy. This class, therefore, can only exist in the minds or actions of the alleged conspirators. As noted above, such a class has consistently been viewed as failing to provide the type of animus giving rise to a § 1985(3) claim.

Petitioners suggest that the Fifth Circuit's decision in this case is inconsistent with the Third Circuit's decision in *Great American Federal Savings and Loan Ass. v. Novotny*, 584 F.2d 1235, 1244-45 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979), in which the Third Circuit held that a § 1985(3) claim could be maintained by an individual not within the group at which a conspiracy was directed. Petitioners also claim inconsistency with *Griffin v. Breckenridge*, *supra*, where the Court allowed blacks thought to be civil rights workers by the conspirators who attacked them to maintain a claim under § 1985(3). Nothing in the Fifth Circuit's holding

in this case is inconsistent with those decisions. Private Respondents understand *Novotny* as standing for the proposition that individuals whose rights are interfered with because of identification with an independent class (in that case women) motivating an invidiously discriminatory animus may be able to maintain a § 1985(3) claim. On the other hand, in *Griffin* the plaintiffs were members of the independent class-blacks. In this case, since no class independent of the conspiracy exists, there can be no individual sufficiently allied with it or existing as part of it to come within the confines of either *Novotny* or *Griffin*.

In short, when Petitioners' mischaracterization of the Fifth Circuit's holding in this case is corrected, it becomes clear the Fifth Circuit has acted consistently with other Courts of Appeals' decisions and decisions of this Court.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

DATED: August 17, 1987.

Respectfully submitted,

Frank Finn
James B. Harris*

Lead Counsel for Private Respondents

3300 First City Center
1700 Pacific Avenue
Dallas, Texas 75201
Telephone: (214) 969-1700

**Counsel of Record*

Other Counsel for Private Respondents are Listed on the Inside Front Cover.